ALBERTA
LAW REFORM
INSTITUTE

CLASS ACTIONS

Final Report No. 85

December 2000

101-01852/

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

CLASS ACTIONS

Final Report No. 85

December 2000

ISSN 0317-1604
ISBN 1-896078-03-6

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are The Hon. Mr. Justice B.R. Burrows; C.W. Dalton; A. de Villars, Q.C.; A.D. Fielding, Q.C.; The Hon. Judge N.A. Flatters; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); A.D. Macleod, Q.C.; Dr. S.L. Martin, Q.C.; Dr. D.R. Owram; The Hon. Madam Justice B.L. Rawlins; The Hon. Mr. Justice N.C. Wittmann (Chairman); and Professor R.J. Wood.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director) and M.A. Shone. W.H. Hurlburt, Q.C. is a consultant to the Institute.

The Institute's office is located at:

402 Law Centre,
University of Alberta,
Edmonton, Alberta, T6G 2H5.

Phone: (780) 492-5291
Fax: (780) 492-1790.

The Institute's electronic mail address is:

reform@alri.ualberta.ca

This and other Institute reports are available to view or download at the ALRI website: http://www.law.ualberta.ca/alri/

ACKNOWLEDGMENTS

There are a great many people whom we have to thank and whose contributions must be acknowledged as we bring this report to a conclusion.

First, and foremost, we acknowledge the work of Margaret Shone, our Institute Counsel, who has had carriage of the project. She carried the topic through our Pilot Project process and had the challenging task of collecting and synthesizing the views on this topic in a relatively short period of time.

This project was the pilot for a revised process which proceeds through two stages. Phase one examines the need for reform, the issues in play, and the views of those who might be impacted by any changes in the law. In essence, phase one gauges the interest of the broader community in class proceedings as a topic for reform, examines the feasibility of the proposed project, and develops a business plan for how the project would be carried out if adopted. (This process is described at pages 1 to 3 of Chapter 1.) Appendix B lists the persons consulted in various ways on this project. The list includes the persons who were consulted at this early stage on the need for reform and on the interest of the groups they represent in that reform proceeding.

Phase one culminates with the decision by the Board to formally adopt the project according to the business plan laid out in the feasibility study. It is at that stage, with the assistance of the considerable information developed during the feasibility study, that the actual project commences.

It is also at that time that a Project Advisory Committee is constituted. In the case of this project, the Committee was chaired by Professor Rod Wood, an ALRI Board member, and the membership consisted of:

Richard H. Bowes
Justice Brian R. Burrows
Stewart N. Douglas
Richard B. Drewry
Ray Hansen
Elizabeth A. Johnson
Peter J. Lown, Q.C.
Donna Molzan

Our Project Committee worked hard to review and shape various drafts of a Consultation Memorandum, considered the responses to consultation on that memorandum, and gave advice on the content of the recommendations. We acknowledge, with thanks, the considerable time and effort that Committee members expended.

The list in Appendix B includes those persons who responded to our Consultation Memorandum, provided information in response to specific questions from Institute Counsel, or provided information about the operation of a case management model which has been developed in Alberta to deal with multi-plaintiff actions. Among others, the Civil Practice Advisory Committee of the Law Society reviewed the draft recommendations and provided very detailed and helpful feedback.

In September 2000, we held an invitational consultation session to compare the similarities, differences, and potential relationship between modern class action proceedings and the case management model referred to in the previous paragraph. The persons invited had been involved in one way or another with proceedings of these sorts. The advice and information we received from this meeting were invaluable. The invitees are also listed in Appendix B.

After the project was formally adopted in the summer of 1999, Mrs. Shone was assisted by Ms. Vivian Stevenson and Mr. Richard Bowes, who were then also Counsel to the Institute. Mr. Bowes' original work on statistical evidence is referenced at page 133. In addition, during the summers of 1999 and 2000, our summer research assistants provided valuable back-up assistance. They were Mr. Glenn Taylor, Ms. Debra Curcio and Ms. Bonnie Bokenfohr.

Finally, it is important to note the work of the Board, whose responsibility it is to give formal and informed imprimatur to the recommendations. The subject of class proceedings occupied a number of meetings, requiring knowledgeable and creative input. Project Committee members and the persons consulted freely and frankly provided their views on class proceedings and on the effect that class proceedings legislation may have on the litigation system generally. Strongly-held views were expressed as arguments were made for divergent approaches. The discussions assisted and influenced the Board in reaching its final position. While every view could not eventually carry the day, it was important that all views were fully and comprehensively put so that the Board could understand the issues and ensure that these views were properly considered in the final recommendations which are now made.

We would be remiss if we did not acknowledge the reliance we were able to place on the work done by the Uniform Law Conference of Canada in its Uniform Class Proceedings legislation. We have referenced a number of important source materials in the table of references, and we were considerably assisted by the work of a number of Law Reform Commissions, both in Canada and in the Commonwealth. We may be forgiven for singling out work of the Ontario Law Reform Commission which was the precursor to the Uniform Law Conference proposals, and which is regarded as a seminal work on this particular topic. It is a tribute to the Commission that its work continues to have this influence, while the Commission regrettably no longer operates.

This report will provide the background for drafting instructions to the Office of Legislative Counsel. It is expected that a draft Act will be prepared for further consultation and review during 2001, and a bill prepared for introduction in the Legislature no later than the spring of 2002.

As always, a Final Report is a group effort, and we thank all of those who have played a part.

Table of Contents

ABBREVIATIONS xv
  Statutes / Rules xv
  Canadian Books and Looseleaf Services xv
  Government / Law Reform Publications xvi

PART I — EXECUTIVE SUMMARY xix
  A. Recommendations for Class Actions Reform xix
  B. Background to Recommendations xx
    1. Underlying policy xx
    2. Shortcomings of existing procedures – is reform needed? xxi
    3. Reform in other jurisdictions xxi
    4. Broad consultation and divergent opinion xxi
    5. Choices considered xxiii
  C. Details of Recommendations xxiii
  D. Conclusion xxiv

PART II — LIST OF RECOMMENDATIONS xxv

PART III — REPORT 1

CHAPTER 1. INTRODUCTION 1
  A. Project Scope 1
  B. Project History 2
  C. The Test (Guiding Principles) 3
  D. Consultation Results 4
  E. This Report 5

CHAPTER 2. THE CURRENT SITUATION 7
  A. Growing Complexities of Litigation 7
  B. Ability of Existing Law to Handle the Growing Complexities 11
    1. Judicature Act, section 8: court power to avoid a multiplicity of proceedings 12
    2. Rule 42: representative actions 13
    3. Other procedures 18
      a. Test cases 18
      b. Group litigation 19
      c. Potpourri of other procedural tools 19
    4. Judicial case management of multiple-plaintiff similar-claim litigation 21
      a. Growing use of judicial case management 21
      b. Use in multiple-plaintiff similar-claim litigation 22

            - i. The emerging Alberta model 22
            - ii. How it works 23
        - c. Adequacy of Alberta's unified judicial case management model 24
- C. Precedents for Reform: Modern Class Action Laws 25
    - 1. What is a class action? 25
    - 2. Other Canadian jurisdictions 26
        - a. Experience under modern Canadian regimes 27
            - i. What types of claims have been brought? 28
            - ii. How frequently has class proceeding certification been sought? 28
            - iii. How successful have class proceedings been, once certified? 29
    - 3. United States 30
        - a. Origin: Federal Rule 23 30
        - b. Obstacles to understanding the American experience 30
        - c. Changing class actions landscape 31
        - d. Criticisms of class actions 33
        - e. Rand Institute conclusions 33
        - f. Relevance of American experience to Canada 34
    - 4. Class actions in other jurisdictions 37
        - a. Australia 37
        - b. Studies recommending class proceedings legislation 37
    - 5. Summary 38
- D. Precedents for Reform: England's GLO Rules 38
    - 1. Supreme Court Rules 1965 38
    - 2. Lord Woolf's Report 39
    - 3. GLO Rules 41
- E. Conclusion 42

CHAPTER 3. NEED FOR REFORM 43

- A. Basic Social Policy 43
- B. Procedural Objectives 43
    - 1. Plaintiffs should be able to bring deserving claims 44
    - 2. Defendants should be protected from unreasonable claims 45
    - 3. The civil justice process should be certain and efficient 45
- C. Adequacy of the Existing Law 46
- D. Reform of Class Actions 49
    - 1. The options 49
        - a. Further develop Alberta's emerging unified judicial case management model 49
        - b. Otherwise amend the Alberta Rules of Court 50
        - c. Introduce a modern class actions regime 51
    - 2. Potential benefits of class action regimes 51
        - a. Benefit to society 51

            i. Arguments for class actions 51
            ii. Arguments against class actions 52
        b. Benefit to plaintiffs 53
        c. Benefit to defendants 54
    3. Potential risks of class action regimes 55
        a. Class action laws promote litigation 55
            i. Argument 55
            ii. Response 55
        b. Many class actions lack merit 56
            i. Argument 56
            ii. Response 56
        c. Class counsel are the main beneficiaries 57
            i. Argument 57
            ii. Response 57
        d. Disproportionately high damages awards 58
            i. Argument 58
            ii. Response 59
        e. Interests of class members are poorly served 59
            i. Argument 59
            ii. Response 60
        f. Costs of litigating far outweigh benefits to the class 61
            i. Argument 61
            ii. Response 61
        g. Class actions invite forum shopping 61
            i. Argument 61
            ii. Response 62
        h. Harm to the Alberta advantage 63
            i. Argument 63
            ii. Response 63
E. Discussion and Recommendation 63

CHAPTER 4. A NEW PROCEDURE FOR CLASS ACTIONS 67
A. Identifying Actions for Which Class Action Procedures are Appropriate 67
    1. Criteria 67
        a. Why the issue arises 67
        b. Rule 42 67
        c. Class proceedings precedents 68
        d. Creation of subclasses 72
        e. Consultation and recommendation. 72
    2. Non-bars 75
        a. Why the issue arises 75
        b. Rule 42 75
        c. Class proceedings precedents 75
        d. Consultation and recommendation 75
B. Establishing the Presence of the Characteristics 76

- 1. Why the issue arises 76
- 2. Rule 42 76
- 3. Class proceedings precedents 77
- 4. A word about jurisdiction 78
- 5. Consultation and recommendations 79
  - a. Commencement 80
  - b. Application for certification 81
  - c. Timing of application 83
  - d. Application process 83
  - e. Court role where criteria satisfied 84
  - f. Certification order 84
  - g. Refusal to certify 85
  - h. Amendment of certification order or decertification 85
  - i. Certification of a settlement class 85

C. Selecting the Representative Plaintiff 87
- 1. Why the issue arises 87
- 2. Rule 42 88
- 3. Class actions precedents 88
- 4. Consultation and recommendations 90

D. Determining the Class: Opting Out or Opting In? 92
- 1. Why the issues arise 92
- 2. Rule 42 92
- 3. Class proceedings precedents 93
  - a. Resident class members: opting out 93
  - b. Non-resident class members: opting in 93
  - c. A third option 94
- 4. Consultation and recommendations 95
  - a. General position 95
  - b. Arguments for and against opting out 95
  - c. Arguments for and against opting in 96
  - d. Arguments for and against judicial choice 97
  - e. Principal recommendation 98
  - f. Non-residents 98
  - g. Clarification of status 99
  - h. Defendant application for a plaintiff class 99

E. Right of Class Members to Participate in the Conduct of the Class Action 100
- 1. Why the issue arises 100
- 2. Rule 42 101
- 3. Class proceedings precedents 101
- 4. Consultation and recommendation 101

F. Notice 102
- 1. Why the issue arises 102
- 2. Rule 42 102
- 3. Class proceedings precedents 102
- 4. Consultation and recommendations 103

G. Common Issues and Individual Issues 106

- 1. Why the issue arises ... 106
- 2. Rule 42 ... 106
- 3. Class proceedings precedents ... 106
- 4. Consultation and recommendation ... 107

H. Court Role (Judicial Case Management) ... 108
- 1. Why the issue arises ... 108
- 2. Rule 42 ... 108
- 3. Class proceedings precedents ... 109
- 4. Consultation and recommendation ... 110

I. Discovery and Witness Examination ... 112
- 1. Why the issue arises ... 112
- 2. Rule 42 ... 113
  - a. Discovery ... 113
  - b. Examination as a witness ... 113
- 3. Class proceedings precedents ... 114
  - a. Discovery ... 114
  - b. Examination as a witness ... 115
- 4. Consultation ... 116
  - a. Discovery: general law ... 117
  - b. Discovery: representative plaintiff of the main class ... 118
  - c. Discovery: representative plaintiff of a subclass ... 119
  - d. Discovery: non-party class members ... 120
  - e. Examination as a witness before an application ... 122

J. Other Procedural Issues ... 125
- 1. Why the issue arises ... 125
- 2. Rule 42 ... 125
- 3. Class proceedings precedents ... 125
- 4. Consultation and recommendations ... 125

K. Settlement, Discontinuance and Abandonment ... 125
- 1. Why the issue arises ... 125
- 2. Alberta Rules ... 125
- 3. Class proceedings precedents ... 126
- 4. Consultation and recommendations ... 127

L. Monetary Relief ... 129
- 1. Why the issue arises ... 129
- 2. Rule 42 ... 129
- 3. Class proceedings precedents ... 129
- 4. Consultation and recommendations ... 130
  - a. Quantification of Liability ... 131
    - i. Aggregate versus individual awards ... 131
    - ii. Use of statistical evidence ... 132
  - b. Apportionment of aggregate awards ... 133
    - i. Individual apportionment ... 134
    - ii. Average apportionment ... 134
  - c. Distribution of aggregate awards ... 134
  - d. Dealing with undistributed portion of aggregate award ... 135

        - i. Cy-près distribution 136
        - ii. Undistributed residue 136
- M. Appeals 141
    - 1. Why the issue arises 141
    - 2. Rule 42 141
    - 3. Class proceedings precedents 141
    - 4. Consultation and recommendations 142
- N. Costs as Between Parties 143
    - 1. Why the issue arises 143
    - 2. Rule 42 144
    - 3. Class proceedings precedents 144
    - 4. Consultation and recommendations 146
        - a. Rationale for costs 147
        - b. Arguments for and against costs 148
            - i. Plaintiff perspective: for costs 148
            - ii. Plaintiff perspective: against costs 149
            - iii. Defendant perspective: for costs 149
            - iv. Defendant perspective: against costs 150
        - c. Arguments for "no costs" 150
            - i. Plaintiff perspective: for "no costs" 150
            - ii. Plaintiff perspective: against "no costs" 150
            - iii. Defendant perspective: for "no costs" 151
            - iv. Defendant perspective: against "no costs" 151
        - d. Public interest arguments 152
        - e. Discussion 152
        - f. Conclusion 154
- O. Legal Fees and Disbursements Incurred in the Conduct of a Class Action 154
    - 1. Why the issue arises 154
    - 2. Rule 42 155
    - 3. Class proceedings precedents 156
    - 4. Consultation and recommendations 159
        - a. Main recommendation 159
        - b. Timing of court approval of a fee agreement 159
            - i. Approval at or before certification 160
            - ii. Approval upon determination of the common issue or settlement 162
            - iii. Recommendation 163
        - c. Contributions to expenses 164
- P. Limitation Periods 165
    - 1. Why the issue arises 165
    - 2. Rule 42 166
    - 3. Class proceedings precedents 166
    - 4. Consultation and recommendations 166
- Q. Role of Representative Plaintiff's Counsel 168
    - 1. Why the issue arises 168
    - 2. Rule 42 168

3. Class proceedings precedents ... 168
4. Consultation and recommendations ... 169
R. Defendant Class Proceedings ... 170
1. Why the issues arises ... 170
2. Rule 42 ... 170
3. Class proceedings precedents ... 171
4. Consultation and recommendations ... 173
a. Reasons supporting defendant class actions ... 173
b. Objections to defendant class actions ... 175
i. Defendant commonality ... 175
ii. Relief claimed ... 176
iii. Selection of representative defendant ... 177
iv. Opting out ... 179
v. Binding effect ... 181
vi. Limitation periods ... 182
c. Recommendation for defendant class actions ... 183
d. Modification of plaintiff class action provisions ... 183
i. Certification requirements: a plan for "advancing" the proceedings ... 184
ii. Timing of application for certification ... 185
iii. The "common issue" requirement ... 186
iv. Opting in or out ... 187
v. Discontinuance ... 190
vi. Limitation periods ... 190
S. Application of Class Proceedings Provisions ... 193
1. Why the issue arises ... 193
2. Rule 42 ... 193
3. Class proceedings precedents ... 193
4. Consultation and recommendation ... 193

CHAPTER 5. CONCLUSION ... 195
A. Principles Applied ... 195
B. Implementation: Statute or Rules? ... 196
1. Statutory implementation ... 196
2. Rules implementation ... 197
3. Both statute and rules ... 198
4. Recommendation ... 198

APPENDIX A

ULCC *CLASS PROCEEDINGS ACT* ... 201

APPENDIX B

INDIVIDUALS CONSULTED ON CLASS ACTIONS PROJECT ... 247

ABBREVIATIONS

The following tables give abbreviations for the major references referred to in this consultation document.

Statutes / Rules

Abbreviation	Jurisdiction	Title	Citation
AR	Alberta	Rules of Court	AR 390/68
BC Act	British Columbia	*Class Proceedings Act*	R.S.B.C. 1996, c. 50; first enacted as S.B.C. 1995, c. 21
ManLRC Act	Manitoba	*Class Proceedings Act*	Proposed by Manitoba Law Reform Commission in ManLRC Report
Ont Act	Ontario	*Class Proceedings Act, 1992*	S.O. 1992, c. 6
Que Code	Quebec	Code of Civil Procedure	R.S.Q., c. C-25; first enacted as S.Q. 1978, c. 8, s. 3
ULCC Act	Canada	*Class Proceedings Act*	Proposed by Uniform Law Conference of Canada (appended to this Consultation Memorandum)

Canadian Books and Looseleaf Services

Abbreviation	Citation
Branch	Ward K. Branch, *Class Actions in Canada*, looseleaf service (Vancouver: Western Legal Publications, December 1998).
CM9	Alberta Law Reform Institute, *Class Actions*, Consultation Memorandum No. 9 (March 2000).
Cochrane	Michael G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Aurora, Ontario: Canada Law Book, 1993).
Eizenga, Peerless & Wright	Michael A. Eizenga, Michael J. Peerless and Charles M. Wright, *Class Actions Law and Practice*, looseleaf service (Toronto and Vancouver: Butterworths, June 1999).
Stevenson & Côté (1)	Stevenson & Côté , *Civil Procedure Guide*, (Edmonton: Juriliber, 1996), 2 vols.

Stevenson & Côté (2)	Stevenson and Côté , *Alberta Civil Procedure Handbook 2000*.
Stevenson & Côté (3)	Stevenson and Côté , *Alberta Civil Procedure Handbook 2001*.
Sullivan	James Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Toronto and Vancouver: Butterworths, March 1997).

Government / Law Reform Publications

Abbreviation	Jurisdiction	Citation
ALRC Report	Australia	The Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No. 46 (Canberra: Commonwealth of Australia, 1988).
BC Consultation Document	British Columbia	British Columbia Ministry of the Attorney General, *Consultation Document: Class Action Legislation for British Columbia* (Victoria: Queen's Printer, May 1994).
CBA Report	Canada	Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (August 1996).
FedCt DP	Canada	Federal Court of Canada, The Rules Committee, *Class Proceedings in the Federal Court of Canada*, A Discussion Paper (June 9, 2000).
ManLRC Report	Manitoba	Manitoba Law Reform Commission, *Class Proceedings*, Report #100 (Winnipeg: Manitoba Publications Branch, January 1999).
Man Task Force Report	Manitoba	Government of Manitoba, *Manitoba Civil Justice Review Task Force Report* (1996).
NSW Briefing Paper	Australia	Marie Swain, "Class Actions in New South Wales," NSW Parliamentary Library Briefing Paper No 22/96.
OLRC Report	Ontario	Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982).
Ont Advisory Committee Report	Ontario	Government of Ontario, *Report of the Attorney General's Advisory Committee on Class Actions Reform* (1990).
Rand Institute	United States	Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Executive Summary (Santa Monica, CA: RAND Institute for Civil Justice, March 1999).
SALC Report / WP	South Africa	South African Law Commission, *The Recognition of a Class Action in South African Law* (Report, 1997) / (Working Paper 57, 1995).

SLC Report	Scotland	Scottish Law Commission, *Multi-Party Actions*, Report #154 (1996).
ULCC DP	Canada	Ruth Rogers, *A Uniform Class Actions Statute*, 1995 Proceedings of the Uniform Law Conference of Canada, Appendix O; www.law.ualberta.ca/alri/ulc/95pro/395o.htm.
VLRAC Report	Australia	Victorian Attorney-General's Law Reform Advisory Council, *Class Actions in Victoria: Time For A New Approach* (Report, 1997).
Woolf Report	England	Lord Woolf, *Access to Justice* (Final Report, 1996).

PART I — EXECUTIVE SUMMARY

A. Recommendations for Class Actions Reform

In this report we make recommendations to reform the existing procedure for handling a "class action" (or "representative action" as the historic procedure is called now, under rule 42 of the Alberta Rules of Court). We recommend that Alberta enact a modern class actions statute based on the Canadian model that has been enacted in Quebec, Ontario and British Columbia. Our recommendations are based on the prototype of this model contained in the Uniform *Class Proceedings Act* adopted by the Uniform Law Conference of Canada in 1996.

If adopted, our primary recommendations would add a procedure to the existing procedural framework for handling litigation involving multiple plaintiffs having the same or similar claims against the same defendant (plaintiff class action). Our ancillary recommendations would add a procedure for handling litigation involving multiple defendants who are in the same or a similar position in relation to claims brought against them (defendant class action).

What do we mean by a "modern class actions statute"? In an ordinary action, each litigant is a party in their own right. In an historic representative plaintiff class action (in Alberta, rule 42), one party commences an action on behalf of other persons who have the same claim to a remedy against a defendant for a perceived wrong. That party conducts the action as "representative plaintiff." Only the "representative plaintiff" is a formal party to the proceeding. Other persons having claims that share questions of law and fact in common with those of the representative plaintiff are members of the "class." Once the class has been determined, the class members are bound by the outcome of the litigation even though they generally do not participate in the proceedings.

Modern class actions statutes elaborate and improve upon the "representative action" procedure. Like the historic action, in a modern class action a representative plaintiff conducts the proceeding on behalf of other persons. However, a class member's claim need only be similar to the representative plaintiff's claim; it need not be exactly the same. Here again, all members of the class are bound by the outcome on the common issues. However, provision is made for the formation of subclasses and the separate resolution of issues relating to individual class members in addition to the resolution of issues common to the main class or a subclass. A number of statutory safeguards and an expanded role for the court help to ensure that the interests of the class members are protected. For example, a court must approve ("certify") a proceeding as a class proceeding before it can go forward, approve notices to class members, approve a settlement or discontinuance of the action and approve an agreement between the representative plaintiff and class counsel for the payment of lawyer fees and disbursements.

B. Background to Recommendations

1. Underlying policy

The phenomenon of many individuals having the same or similar claims against one or more defendants is a modern reality. If dealt with on an individual basis, this litigation can be costly, complex and cumbersome. As they have in other jurisdictions, lawsuits involving large numbers of claimants are being brought in a wide variety of cases. Recent Alberta examples include the much-publicized wrongful sterilization litigation, the residential school litigation and the pine shakes litigation. Examples elsewhere include cases involving defective consumer or industrial products, misrepresentation of products or services, securities breaches, mass disasters and creeping disasters (such as injury to health over a prolonged time period or environmental damage), to name but a few. Courts in Alberta face the challenges of the growing complexities of litigation.

Our recommendations are founded on an acceptance of the view that the basic social policy underlying the civil justice system is to provide legal remedies for legal wrongs. In most situations, this involves compensating persons who have been wronged by others with an award of money damages. The legal wrong giving rise to the remedy may stem from a breach of contract, tort or other legal cause. Awarding compensation may also have a deterrent effect on future conduct.

In developing our recommendations, we have been mindful that the goal is to help ensure that Alberta's civil justice system operates in a manner that is fair, certain and efficient for proceedings in which a number of plaintiffs have the same or similar claims against the same defendant or defendants. Plaintiffs should be able to bring deserving claims, defendants should be protected from unreasonable claims, and the civil justice process should be certain and efficient. The assessment of the existing law and examination of reform options is based on a consideration of these principles. Our recommendations are directed at procedural reform. We do not recommend the creation of new substantive rights and liabilities unrelated to the procedural issues.

2. Shortcomings of existing procedures – is reform needed?

Before forming our recommendations, we reached the conclusion that it is both possible and desirable to improve upon the existing procedural tools. The courts have interpreted rule 42 (and its equivalents in other jurisdictions) so restrictively that many cases involving persons having similar claims cannot be brought within its strictures. Its shortcomings to meet the exigencies of modern litigation have been the subject of comment by the Supreme Court of Canada (in *Naken* v. *General Motors of Canada*) and the Alberta Court of Appeal (in *Western Canadian Shopping Centres* v. *Dutton*). The Alberta Court of Appeal expressed its opinion that "this area of the law is clearly in want of legislative reform to provide a more uniform and efficient way to deal with class action law suits."

3. Reform in other jurisdictions

Within Canada, three jurisdictions – Quebec, Ontario and British Columbia – have enacted modern class actions statutes. The Uniform Law Conference of Canada and the Manitoba Law Reform Commission have recommended the enactment of modern class actions statutes and the Rules Committee of the Federal Court has recommended the adoption of similar provisions in rules of court. Elsewhere in the Commonwealth, Australia has enacted modern class actions legislation and law reform commissions in Scotland and South Africa have recommended its enactment.

4. Broad consultation and divergent opinion

We consulted widely on the question of the need to reform the procedures currently available to handle litigation involving multiple plaintiffs having similar claims. Various methods of consultation were employed. They included:

- establishing an advisory committee of a cross-section of lawyers – corporate and government counsel and lawyers in private practice with experience acting for plaintiffs and defendants;
- inviting comment on the issues raised in Consultation Memorandum No. 9 on *Class Actions* (CM9) – publicizing its availability through the Law Society of Alberta and Canadian Bar Association, distributing hard copies and posting it on our website for downloading;
- interviewing persons with relevant knowledge; and
- holding an invitational consultation session to compare the relative strengths of the existing judicial case management approach with the approach taken in modern class actions statutes.

Alberta lawyers registered strong support for the introduction of modern class actions provisions. Although the support is widespread, that support is not unanimous. Persistent themes of controversy sparked a lively debate about the social purposes of class actions. Some respondents voiced reservations about the direction in which the expansion of class actions is taking us as a society. Among other matters, they were concerned about the cost to society overall of a law that, in their view, encourages needless litigation (large costs to defendants for small returns to individual class members). Some of the persons who expressed reservations thought that, used creatively, the existing law can provide what is needed. Others saw value in reforming the existing law in order to clarify the procedures and make them more relevant to modern situations. Even among those supporting reform, views differed as to the form the changes should take. The disparate ideological underpinnings of the divergent views make the differences difficult to resolve. We have listened carefully to the views of those who voiced reservations about class actions reform and tried to respond reasonably to those views in our recommendations.

In summary, we have found that there is general support for class actions reform in Alberta. We are not persuaded that the concerns expressed by persons who question the need for reform tip the balance against reform, although we remained alert to these concerns in framing our detailed recommendations for reform. Our position is that reform is needed and we recommend that reform take place.

5. Choices considered

We concluded that reform is needed, but how should this reform be achieved? We considered three options: (1) to further develop Alberta's emerging judicial case management model; (2) to otherwise amend the Alberta Rules of Court; or (3) to introduce a modern class actions regime. We give an account of the advantages and disadvantages we see in each option in chapter 3 of our report, before recommending the third option.

C. Details of Recommendations

Our report contains detailed recommendations for class actions reform. Legislation embodying these recommendations would include:

- criteria that must be met to establish a class action;
- a certification procedure to determine that it is appropriate for an action to proceed as a class action;
- conduct of the proceeding by a representative plaintiff whose suitability is determined by the court;
- court-approved notice to class members (or potential class members) that a class action has been certified;
- an opportunity for resident class members to opt out of the class proceeding and for non-resident class members to opt in;
- provision for the formation of subclasses, each with its own representative plaintiff, where some members of the main class share issues that are not common to other members of the main class;
- active judicial case management of the proceeding;
- notice to class members that the common issues in the class action have been resolved, whether by settlement or judicial disposition;
- provision for the determination of individual issues separate from the common issues;
- aggregate or individual assessment of damages;

- various provisions designed to ensure the protection of the interests of class members, such as:
    - court approval of a settlement or discontinuance of the action,
    - court approval of an agreement for the payment of fees and disbursements entered into between the representative plaintiff and class counsel, and
    - judicial discretion to allow class members to participate in the proceeding;
- provisions regarding the suspension of limitation periods; and
- binding effect of the outcome of the action on class members.

We also make recommendations for defendant class actions. These recommendations are based on the plaintiff class action provisions, but with certain modifications to take into account differences in the position of plaintiffs and defendants in litigation.

D. Conclusion

Our conclusion is that reform is needed. Litigation involving multiple claims by persons who are similarly-situated is a reality of today's society in Alberta and elsewhere. Alberta's existing procedures available for dealing with these claims have significant shortcomings. They can and should be improved. Other Canadian jurisdictions have met shortcomings of a like nature by enacting class actions legislation. In our opinion, the Canadian legislative model of class actions reform is a good model. Therefore, we recommend that Alberta enact a modern class actions statute based on this model, but modified in accordance with the recommendations contained in our report.

PART II — LIST OF RECOMMENDATIONS

Chapter 3 - Need for Reform

RECOMMENDATION No. 1

Reform recommended

The existing law governing proceedings involving multiple plaintiffs with similar claims against the same defendant or defendants should be reformed. 49

RECOMMENDATION No. 2

Canadian class actions model

Alberta should introduce a modern class actions regime. In developing this regime, Alberta should be guided by the Canadian class actions model as exemplified by the ULCC Act. 65

Chapter 4 - A New Procedure for Class Actions

RECOMMENDATION No. 3

Criteria to establish a class action

(1) Five criteria should be satisfied before an action is allowed to proceed as a class action. They are that:
  - (a) the pleadings disclose a cause of action,
  - (b) there is an identifiable class of two or more persons,
  - (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members,
  - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and
  - (e) there is a representative plaintiff who
    - (i) would fairly and adequately represent the interests of the class,
    - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) "Common issues" should be defined to mean:
  - (a) common but not necessarily identical issues of fact, or
  - (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

(3) Subclasses having their own representative plaintiff should be created where the court is satisfied that this is necessary to protect the interests of

the members of identifiable subclasses with common issues that are not common to the class as a whole or in fairness to defendants. 74

RECOMMENDATION No. 4

Factors that do not bar an action

In order to protect actions brought under the new regime from the restrictive interpretation the courts have placed on representative actions under rule 42, Alberta should specify that none of the following five matters bar an action from being conducted as a class action:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
(b) the relief claimed relates to separate contracts involving different class members;
(c) different remedies are sought for different class members;
(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or
(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members. 76

RECOMMENDATION No. 5

Commencement and certification

(1) Any person or entity who can otherwise commence an action or application should be able to commence a class action. That person should be required to seek certification (permission to take the action forward as a class action) and appointment as representative plaintiff within 90 days after the last statement of defence was served or at any other time with leave of the court
(2) A defendant should be able to apply for certification of a class of plaintiffs and appointment of a representative plaintiff.
(3) The court should be able to certify a person who is not a member of the class as the representative plaintiff where it is necessary to do so in order to avoid a substantial injustice to the class.
(4) The court should have power to adjourn an application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
(5) A class that comprises persons resident in Alberta and persons not resident in Alberta should be divided into resident and non-resident subclasses.
(6) A certification or subclass certification order should:
    (a) describe the class in respect of which the order was made by setting out the class's identifying characteristics,
    (b) appoint the representative plaintiff for the class,
    (c) state the nature of the claims asserted on behalf of the class,
    (d) state the relief sought by the class,
    (e) set out the common issues for the class,

(f) state the manner in which and the time within which a class member who is a resident of Alberta may opt out of the proceeding,
(g) state the manner in which, and the time within which, a potential class member who is not a resident of Alberta may opt in to the proceeding, and
(h) include any other provisions the court considers appropriate.

(7) The court should be able to amend a certification order on the application of a party or class member or on its own motion.

(8) Where certification is sought for the purpose of binding the members of a settlement class, court approval of the settlement should be required as it would if the action were to proceed.

(9) (a) The court should be able to decline to certify the litigation as a class proceeding or, on the application of a party or class member or on its own motion, decertify it if it is demonstrated that the criteria for certification are not met.
(b) Where the court refuses to certify or makes a decertification order, the court should be able to permit the proceeding to continue as one or more proceedings and make appropriate directions. 86

RECOMMENDATION No. 6
Selection of representative plaintiff

(1) The representative plaintiff of a class or subclass should be a person who:
(a) would fairly and adequately represent the interests of the class or subclass,
(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class or subclass and of notifying class or subclass members of the proceeding, and
(c) does not have, on the common issues for the class or subclass, an interest that is in conflict with the interests of other class or subclass members.

(2) Where it appears to the court that a representative plaintiff is not fairly and adequately representing the interests of the class or subclass, the court should be able to substitute another class or subclass member or any other person as the representative plaintiff. 92

RECOMMENDATION No. 7
Determination of class membership: opting out and opting in

(1) Class members resident in Alberta who do not want to be bound by the outcome of a class action brought by a plaintiff on their behalf should be given an opportunity to opt out of the proceedings

(2) Where the court certifies a plaintiff class on a defendant's application, members of the class should not be able to opt out except with leave of the

court. However, special provision should be made giving any member of the plaintiff class the right to apply to be added as a named plaintiff for the purpose of conducting their own case.

(3) Potential class members who are not resident in Alberta but who wish to join the class action should be required to opt in to the proceedings.

(4) The court should have power to determine whether or not a person is a member of a class or subclass. 100

RECOMMENDATION No. 8

Participation of class members in proceeding

The court should have power to determine whether or not, when and how class members may participate in the proceeding if this would be useful to the class or subclass. 102

RECOMMENDATION No. 9

Notification of class members

(1) The representative party should be required to notify all class members of
    (a) the certification of the class proceedings,
    (b) the resolution of common issues which have been resolved in favour of the class, which notice shall include notice of the right to attend and participate in the mandatory review of class counsel's fees and disbursements and give details of the scheduled review, and
    (c) an application for certification of a settlement class, in which case, in addition to other matters stipulated, the notice should state the terms of the settlement,

but the court may dispense with the notice if it considers it proper to do so.

(2) In addition to the notice required under subsection (1), the court should be able to order that notice be given whenever the court considers it necessary to protect the interests of any class member or party, or to ensure the fair conduct of the proceeding.

(3) Court approval of the content of any notice and the method of delivery should be required before notice is given.

(4) With leave of the court, the representative plaintiff should be able to include in the notice of certification, a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.

(5) The court should have the authority to order a party to give the notice required of another party, and to make any order it considers appropriate as to the costs of any notice. 105

RECOMMENDATION No. 10

Determination of common issues and individual issues

(1) Unless the court orders otherwise,
    (a) common issues for a class should be determined together,

   (b) common issues for a subclass should be determined together, and
   (c) individual issues that require the participation of individual class members should be determined individually.

(2) A resolution of the common issues, whether by judgment or settlement, should bind every member of a resident class who has not opted out of the proceedings and every member of a non-resident class who has opted in to the proceedings; it should not bind a resident who opted out of the class proceeding; and it should not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out.

(3) With leave of the court, a class member who
   (a) did not receive notice of the certification order, or
   (b) was unable by reason of mental disability to respond to the notice in time

should be placed in the same position as a person who opted out of the class proceeding.

(4) The court should have the power to decide whether and how to determine individual issues that are not resolved by the determination of the common issues and to make individual assessments of liability where this cannot reasonably be determined without proof by those individual class members. In deciding how the individual issues will be determined, the court should be able to dispense with or impose any procedural steps or rules that it considers appropriate, consonant with justice to the class members and parties. 107

RECOMMENDATION No. 11

Court powers

(1) The court should have broad powers respecting the conduct of a class proceeding to ensure its fair and expeditious determination, including the power at any time to stay or sever any related proceeding.

(2) The judge who makes a certification order should hear all applications before the trial of the common issues, but should not preside at the trial except with the consent of the parties. 112

RECOMMENDATION No. 12

Discovery and witness examination

(1) (a) The defendant and representative plaintiff of a class or subclass should have the same rights of discovery against one another through record production and oral examination as would parties in any other proceeding.

   (b) Class members should only be discovered after the discovery of the representative plaintiff, and then only with leave of the court which may impose any terms that it considers appropriate on the purpose and scope of the discovery and use of the evidence obtained.

    (c) A class member should be subject to the same sanctions as a party for failure to submit to discovery.

(2) The court should be able to require the parties to propose which class members should be discovered.

(3) Leave of the court should be required to examine a class member as a witness for the purpose of using his evidence upon any motion, petition or other proceeding before the court or any judge or judicial officer in chambers.

(4) The court hearing an application for leave to discover class members or to examine a class member as a witness should be required to take into account
    (a) the stage of the class proceeding and the issues to be determined at that stage,
    (b) the presence of subclasses,
    (c) whether the discovery is necessary in view of the defences of the party seeking leave,
    (d) the approximate monetary value of individual claims, if any,
    (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered, and
    (f) any other matter the court considers relevant. 124

RECOMMENDATION No. 13

Application of Alberta Rules of Court

The Alberta Rules of Court should apply to class proceedings to the extent that those rules are not in conflict with these recommendations. 125

RECOMMENDATION No. 14

Settlement, discontinuance, abandonment and dismissal

(1) No settlement, discontinuance or abandonment of the issues common to a class or subclass should be permitted without the approval of the court.

(2) In deciding whether or not to approve a settlement agreement, the court should be required to find that the agreement is fair, reasonable and in the best interests of those affected by it. In coming to that determination, the court should be directed to consider the following criteria:
    (a) the settlement terms and conditions,
    (b) the nature and likely duration and cost of the proceeding,
    (c) the amount offered in relation to the likelihood of success in the proceeding,
    (d) the expressed opinions of class members other than the representative party,
    (e) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members,

    - (f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members, and
    - (g) any other matter the court considers relevant.
- (3) The court dismissing a class proceeding, or approving a settlement, discontinuance or abandonment, should be required to consider whether and how class members should be notified and whether the notice should include:
    - (a) an account of the conduct of the proceeding,
    - (b) a statement of the result of the proceeding, and
    - (c) a description of any plan for distributing any settlement funds. . 128

RECOMMENDATION No. 15
Monetary relief: aggregate assessment
The court should be authorized to make an aggregate assessment of monetary relief in respect of all or any part of a defendant's liability to class members if:

- (a) monetary relief is claimed,
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
- (c) the aggregate or a part of the defendant's liability can reasonably be determined without proof by individual class members. 139

RECOMMENDATION No. 16
Monetary relief: use of statistical evidence
The court should be able, for purposes of determining issues relating to the amount or distribution of aggregate monetary relief, to admit as evidence statistical information but no provision to this effect is necessary because the development of the common law of evidence has made such a provision redundant. 139

RECOMMENDATION No. 17
Monetary relief: determination of individual claims

- (1) The court should be able to specify procedures for the determination of individual claims where this is necessary to give effect to the order.
- (2) Where the court specifies procedures for the determination of individual claims, it should set a reasonable time within which the claims must be made, after the expiration of which claims should be able to be made only with leave of the court.
- (3) In deciding whether to grant leave to make a late claim, the court should consider whether any other person would suffer substantial prejudice.
- (4) The court should be able to amend a judgment respecting the award of aggregate monetary relief but not so as to increase the amount of an aggregate award. 140

RECOMMENDATION No. 18
Monetary relief: average or proportional sharing of aggregate award
The court should have power to order that an aggregate award shall be shared by class members on an average or proportional basis. 140

RECOMMENDATION No. 19
Monetary relief: distribution of aggregate awards
The court should be able to make orders for the distribution of aggregate awards of damages by any means that it considers appropriate. 140

RECOMMENDATION No. 20
Monetary relief: undistributed residue of aggregate award

(1) The court should be able to order that all or any part of an aggregate award that has not been distributed within a time period set by the court be applied in any manner that may reasonably be expected to benefit class members.

(2) The court should be permitted to order that all or any part of an aggregate award that remains unclaimed or otherwise undistributed after a period of time set by the court, be applied against the cost of the class proceeding, forfeited to the government, or returned to the party against whom the order was made.

(3) The presumption should be that the undistributed amount will be returned to the party against whom the monetary award was made, unless the court considers that in all the circumstances it would be inappropriate to do so.

(4) If the court declines to order the undistributed amount to be returned to the party against whom the award was made, its disposition should be in the discretion of the court. 140

RECOMMENDATION No. 21
Appeals

(1) Appeals from certification or decertification decisions should be available to both plaintiffs and defendants.

(2) Any party should have the right to appeal to the Court of Appeal of Alberta against
    (a) a judgment on common issues, or
    (b) an aggregate damages award.

(3) A class or subclass member, a representative plaintiff or a defendant should have the right to appeal to the Court of Appeal against any order determining or dismissing an individual claim, including an individual claim for monetary relief.

(4) A class or subclass member should be able to apply to the Court of Appeal for leave to act as the representative plaintiff and bring an appeal if a representative plaintiff has not appealed within the time limit specified for bringing an appeal or has discontinued an appeal.

(5) Unless the court orders otherwise, leave under subsection (4) should be required to be sought within 30 days after the appeal period available to the representative plaintiff has expired or the notice of discontinuance was filed. 143

RECOMMENDATION No. 22

Costs as between parties

(1) Unsuccessful parties to the class proceeding should not be liable to pay costs unless:

  (a) there has been vexatious, frivolous or abusive conduct by a party,

  (b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or

  (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

(2) Class members, other than the representative plaintiff, should not be liable for costs except with respect to the determination of their own individual claims. 154

RECOMMENDATION No. 23

Agreements respecting fees and disbursements

(1) Agreements respecting fees and disbursements made by the representative plaintiff and the class counsel should be required to be approved by the court. This approval should occur prior to, or simultaneously with, certification of the proceeding.

(2) After the common issues have been resolved, the representative plaintiff must seek review of the agreement to ensure that the remuneration under the agreement is fair and reasonable in all of the circumstances. The review should be made by the judge who presided over the trial of the common issues or approved the settlement agreement, whichever is the case.

(3) Fees and disbursements payable under an agreement should form a first charge on any monetary award in a class proceeding.

(4) Where the court determines that the agreement ought not to be followed, it should be authorized to amend the terms of the agreement or

  (a) determine the amount owing to the solicitor in respect of fees and disbursements,

  (b) direct an inquiry, assessment or accounting under the Alberta Rules of Court to determine the amount owing, or

  (c) direct that the amount owing be determined in any other manner.

(5) Representative parties should be able to seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class. 164

RECOMMENDATION No. 24

Limitation periods

(1) Limitation periods should be suspended as against class members on the commencement of a class proceeding, whether or not the proceeding is ultimately certified.

(2) Limitation periods should resume running against all class members when:
  - (a) the proceeding is discontinued before the hearing of an application for certification,
  - (b) the application for certification is denied,
  - (c) a decertification order is made,
  - (d) the class proceeding is dismissed without an adjudication on the merits,
  - (e) the class proceeding is discontinued with the approval of the court, or
  - (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(3) Limitation periods should resume running against a particular class member when:
  - (a) the member opts out of the class proceeding, or
  - (b) an amendment made to the certification order or another ruling by the court has the effect of excluding the class member from the class proceeding or from being considered to have ever been a class member.

(4) Where a right of appeal exists, the limitation period should resume running after the appeal period has expired or, if an appeal has been taken, after the appeal has been finally disposed of. 167

RECOMMENDATION No. 25

Class counsel responsibilities

The Law Society of Alberta should document the role and duties of class counsel in class proceedings. 170

RECOMMENDATION No. 26

Defendant class actions

(1) The Alberta class actions regime should provide for defendant class proceedings, that is, proceedings in which one or more individual plaintiffs seek relief against a defendant class. Except as otherwise indicated in subsections (2) to (4), the provisions dealing with plaintiff class actions should apply, with any necessary modifications, to defendant class actions.

(2) Where a plaintiff intends to apply for certification of a defendant class proceeding, the proposed representative defendant should not be required to file a statement of defence on behalf of the class until after the certification hearing.

(3) The condition precedent to certification, that the proposed representative plaintiff has produced a plan for advancing the proceedings on behalf of the class and for notifying class members of the proceeding, should not apply to the proposed representative defendant in a defendant class action.

(4) Members of the defendant class should not have the right to opt out of a defendant class proceeding. However, specific provision should be made giving any member of the defendant class the right to apply to be added as a named defendant for the purpose of conducting their own defence.

(5) A plaintiff should have the right to discontinue a defendant class proceeding without the approval of the court.

(6) The limitation period within which a plaintiff must bring action against a defendant should be suspended by the commencement of a proceeding in which that defendant is a potential member of a defendant class and resume running upon certification or, if the proceeding is discontinued before certification, upon discontinuance. 192

RECOMMENDATION No. 27

Application of new class action provisions

If these recommendations are implemented, the new law should not apply to:

(a) a proceeding that may be brought in a representative capacity under a statutory provision,

(b) a proceeding required by law to be brought in a representative capacity, and

(c) a representative proceeding commenced before the new law takes effect. 193

Chapter 5 - Conclusion

RECOMMENDATION No. 28

Implementation by statute

Alberta should implement the recommendations for a class proceedings regime by statute. 198

PART III — REPORT

CHAPTER 1. INTRODUCTION

A. Project Scope

[1] This report is primarily about litigation involving multiple plaintiffs with similar claims against the same defendant or defendants. This is the historic territory of the Chancery-based "representative action." Several jurisdictions in Canada and elsewhere have adopted a modern form of representative action, popularly known as a "class action." In this report, we consider whether it is possible and desirable to provide a procedural framework for multiple-plaintiff similar-claim litigation that is more satisfactory than the current framework by introducing class actions into Alberta or by some other means. In making our recommendations, we have been mindful of the class actions legislation recently adopted in other provinces. As an ancillary matter, we consider whether the law requires any changes where a number of defendants are in the same or a similar position in relation to claims brought against them. In order to assess the problems with the operation of the existing law and make recommendations for improvements designed to alleviate those problems, we first review the current law and procedures available to handle multiple-plaintiff similar-claim litigation.

[2] In defining the scope of this project, we have distinguished between litigation involving multiple plaintiffs with similar claims against the *same* defendant or defendants from litigation involving multiple plaintiffs with similar claims against *different* defendants. These two situations are closely related and many of the procedural issues overlap. Developments in the law and practice in either of these situations will likely influence developments in the law and practice in the other.

B. Project History

[3] We formally adopted our "class actions" project in July 1999. We did so after having determined that there is significant interest in reform of the law in this area and, clearly, an issue that should be addressed. We arrived at this determination on the basis of concerns that had been expressed to us by the

Benchers of the Law Society of Alberta, what we learned from our preliminary research on developments in other jurisdictions and from responses received from a questionnaire we distributed to a number of lawyers in order to gauge interest in law reform. The lawyers canvassed had special knowledge, experience or awareness of the issues in this area of the law because they had represented plaintiffs or defendants in multiple-plaintiff similar-claim litigation in Alberta.

[4] In September 1999, we established a committee to advise us on the project. The project committee members, whose significant contribution we acknowledge at the front of this report, included lawyers in private practice and both corporate and government counsel.

[5] In March 2000 we issued Consultation Memorandum No. 9 on Class Actions (CM9) in which we asked two major questions:

- Is Alberta's current class actions procedure in need of reform?
- If it is, what should the nature of that reform be? (Here, we raised 16 specific issues.)

We provided as an appendix the annotated Act produced by the Uniform Law Conference of Canada (ULCC). To this Act, we added our own notes to point out the major variations among Canadian jurisdictions that have enacted, or recommended, modern class actions statutes. We requested comments in response by the end of May.

[6] CM9 was distributed widely. We mailed copies to 120 recipients on our project mailing list, posted it on the ALRI website where it is available for downloading in electronic form,[1] and included a notice about its availability in the Law Society newsletter. The Canadian Bar Association notified all section chairs in Alberta about the publication and its availability and encouraged comment.

---

[1] The ALRI website is located at www.law.ualberta.ca/alri. To get to Class Actions, click "Publications" on the left-hand menu of the home page, then "Consultation Memoranda and Other Documents" on the next screen.

[7] In September 2000, we held an invitational consultation session for the purpose of comparing the relationship between two possible approaches to litigation involving multiple plaintiffs with similar claims – the "unified judicial case management" approach being employed currently in the Court of Queen's Bench of Alberta and the modern class actions approach that has been adopted in some Canadian jurisdictions.[2] The advice we received from lawyers who attended this session further helped us to refine our understanding of the problems under the current law and to properly locate our recommendations in the context of the current law and practice.

[8] Appendix B contains a list of those persons whom we have consulted on the issues raised in CM9. The list includes those persons who responded to CM9. The information and opinions gathered during this consultation provided us with invaluable guidance as we deliberated the issues and developed our recommendations.

C. The Test (Guiding Principles)

[9] Our recommendations are founded on an acceptance of the view that the basic social policy underlying the civil justice system is to provide legal remedies for legal wrongs. In most situations, this involves compensating persons who have been wronged by others with an award of money damages. The legal wrong giving rise to the remedy may stem from a breach of contract, tort or other legal cause. A second social policy is to deter wrongful practices.

[10] Working from this foundation, we have been guided in our recommendations by certain principles. We have taken pains to develop recommendations which will help ensure that Alberta's civil justice system operates in a manner that is fair, certain and efficient for proceedings in which a number of plaintiffs have the same or similar claims against the same defendant or defendants. Plaintiffs should be able to bring deserving claims, defendants should be protected from unreasonable claims, and the civil justice process should be certain and efficient. The assessment of the existing law and examination of reform options is based on a consideration of these principles. Our

---

[2] ALRI, Invitational Consultation Session on *Multiple-Plaintiff Similar-Claim Litigation: Relationship between Class Actions and Case Management* (Edmonton, September 18, 2000).

recommendations are directed at procedural reform. We do not recommend the creation of new substantive rights and liabilities unrelated to the procedural issues.

D. Consultation Results

[11] We have concluded from the consultation process that there is widespread support for class actions reform. Although that support is considerable, it is not unanimous. Some respondents voiced reservations about the direction in which the expansion of class actions is taking us as a society. Among other matters, they were concerned about the cost to society over all of a law that, in their view, encourages needless litigation. Some of the persons who expressed reservations think that, used creatively, the existing law can provide what is needed. Others see value in reforming the existing law in order to clarify the procedures and make them more relevant to modern situations. Even among those supporting reform, views differ as to the form the changes should take. We have listened carefully to the views of those who voiced reservations about class actions reform and tried to respond reasonably to those views in our recommendations.

[12] The existence of different views is pretty much inevitable because of the diversity of interests and beliefs in a democratic society. What is more, the persistent themes of controversy that have arisen in "an ideological debate about the social purposes of class actions," especially in the U.S.A., are extraordinarily difficult to resolve.[3]

[13] Accepting the existence of a need for reform, those consulted registered strong support for the enactment of class proceedings legislation. That legislation, it was thought, should follow the model that has been enacted in Quebec,[4] Ontario[5] and British Columbia,[6] and recommended for adoption by the Uniform Law

---

[3] Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Executive Summary (Santa Monica, CA: RAND Institute for Civil Justice, March 1999) (hereinafter Rand Institute) at 2, 3.

[4] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 999-1051; first enacted as S.Q. 1978, c. 8, s. 3 (hereinafter Que Code).

[5] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (hereinafter Ont Act).

[6] *Class Proceedings Act*, S.B.C. 1995, c. 21; now R.S.B.C. 1996, c. 50 (hereinafter BC Act).

Conference of Canada (ULCC),[7] the Manitoba Law Reform Commission (ManLRC),[8] and the Rules Committee of the Federal Court[9]. This is the model on which our recommendations are based. The Uniform *Class Proceedings Act* (ULCC Act),[10] included as Appendix A to this report, is representative of this model.

E. This Report

[14] This report incorporates much of the information presented in CM9, adding to it where our subsequent work has led us to investigate new sources and consider other ideas. It also refers to the views expressed by those consulted.

[15] The report is divided into five chapters. Chapter 1 is introductory. Chapter 2 describes the current situation in Alberta, the existing Alberta law, the law in other Canadian jurisdictions, and modern reforms elsewhere. Chapter 3 examines the need for reform. We determine that reform is needed and should follow the modern Canadian legislative precedents as exemplified in the ULCC Act. Chapter 4 contains our detailed recommendations for change. Chapter 5 concludes the report with a recommendation for the implementation of class actions reform by statute.

---

[7] ULCC *Class Proceedings Act*, adopted in 1996 and available at: http://www.law.ualberta.ca/alri/ulc/acts/eclass.htm (hereinafter ULCC Act).

[8] Manitoba Law Reform Commission, *Class Proceedings* (Report #100) (Winnipeg: Manitoba Publications Branch, January 1999) (hereinafter ManLRC Report).

[9] Federal Court of Canada, The Rules Committee, *Class Proceedings in the Federal Court of Canada* (Discussion Paper) (June 9, 2000) (hereinafter FedCt DP).

[10] *Supra* note 7.

CHAPTER 2. THE CURRENT SITUATION

A. Growing Complexities of Litigation

[16] The phenomenon of many individuals having the same or similar claims against one or more defendants is a modern reality. Law suits are being brought in a wide variety of cases, including cases involving defective consumer or industrial products, misrepresentation of products or services, securities breaches, mass disasters and creeping disasters (such as injury to health over a prolonged time period or environmental damage).[11] Consider these examples:

- Chemical storage tanks explode emitting noxious gases that spread over a nearby residential area. A large number of residents subsequently experience ill health. Their symptoms vary.

- A group of Alberta entrepreneurs solicit funds from investors around the globe for commercial development that does not take place as promised. The investment monies are not returned. Some of these investors relied on information in a prospectus that turned out to be false; others invested on the advice of brokers who acted as intermediaries.

---

[11] The ManLRC Report, *supra* note 8 at 17-18, gives a detailed account of the types of litigation that can involve multiple plaintiffs with similar claims:

> Class actions are useful in tort cases for mass disaster claims (claims arising from single incident mass accidents, such as train derailments and environmental disasters) and for creeping disaster claims (claims for bodily injury arising from consumer products, such as tobacco and asbestos, or medical products, such as intra-uterine devices, breast implants, contaminated blood, jaw implants, silver mercury filings and heart pacemakers). Other uses include "claims of group defamation, nuisance, the principle in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, various statutory torts, damages claims for breach of *Charter* rights, claims arising from illegal strikes, negligent house construction, and negligent misstatement."

Class actions are useful in contract cases for consumer claims for defective products, such as defective toilets, house siding, plastic blinds and heaters. Other uses include misrepresentations, wage and wrongful dismissal claims, disputes over franchise agreements, claims against educational institutions: *ibid*. at 18-19.

In the United States, class actions are useful in commercial law for securities cases arising out of a breach of fiduciary obligations, a failure to disclose, or negligent or misleading representations, but securities and other commercial law class action claims are not common in Canada: *ibid*. at 19-20.

- A large Alberta-based financial institution collapses and many persons of modest means stand to lose their hard-earned savings. Each had been assured, either in promotional literature or by officers of the company, that the financial institution stood on a solid footing and their money was safe.

- A roofing material deteriorates in 10 years instead of being good for 25 years as advertised by the manufacturers after testing and approval by government regulators. Owners of homes using this roofing material are prematurely put to the expense of having their roofs redone.

[17] But is the civil justice system keeping up with the times? Do the processes currently available to deal with such claims meet the fundamental principles of a civil justice system? Do the processes operate in a way that is fair to the interests of both plaintiffs and defendants? Can the processes be readily known? Is their application certain? Are they efficient? Do they keep time and expense in check?

[18] Many people think not. Some have gone so far as to state that "the legal system requires overhaul in order to deal properly with multi-plaintiff actions."[12]

[19] The problems are particularly apparent in cases where the number of claimants is large but the individual damages are small, and in cases where the evidence required to make out the claim is technical and complex. The litigation process in circumstances such as these can be painfully costly, slow and cumbersome. Many persons simply cannot afford the justice the system offers. Indeed, recommendations from the Alberta Summit on Justice held in Calgary, January 27-29, 1999 urged the government to examine "ways to expedite the current justice process and make it more affordable" and "ways to simplify the present justice system so that it is more 'user friendly' and less complicated and intimidating."[13]

---

[12] ManLRC Report, *supra* note 8 at 3, concurring with and quoting from Lord Woolf, *Access to Justice* (Final Report, 1996) at 223, §2 on the situation in England and Wales (hereinafter Woolf Report).

[13] Recommendations, *Report of the All-Party MLA Public Consultation* (which formed the basis for discussion at the Alberta Summit on Justice). The core recommendations in the *Final Report of the Alberta Summit on Justice* (hereinafter Alberta Summit on Justice) included a recommendation that "the language, procedures, and accessibility of the justice system be simplified, made more user friendly, and made easier to understand" and that "recommendations contained in previous studies and

[20] One of the goals of the civil justice system should be to "achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner."[14] This point can be expressed in different ways. If plaintiffs are unable to pursue their rights in court, defendants will not be held accountable for their acts. By giving plaintiffs access to the courts, the civil justice systems helps to regulate conduct in the community. Indeed, one objective identified for class actions is the modification of wrongful behaviour on the part of actual or potential defendants.[15] One benefit for defendants is knowledge of the extent of exposure to liability. This is made known because the notice of a class action is intended to reach all potential claimants having the same or a similar claim.

[21] The problems with the procedural mechanisms currently available in civil justice systems to handle cases in which a number of plaintiffs have the same or a similar interest in the subject matter of the litigation have been apparent in several

---

reports ... be reviewed and implemented." In the *Response of the Government of Alberta to the Final Report*, the Government states its commitment to the eight main themes and 25 core recommendations put forward in the *Final Report* on the Summit. These include "simplifying access to the justice system" (theme two) and "taking action on previous studies and reports on justice" (theme seven).

[14] Woolf Report, *supra* note 12, c. 17, para. 2.

[15] *Abdool* v. *Anaheim Management* (1993), 15 O.R. (3d) 39 at 45-46 (Gen. Div.) (hereinafter Abdool (1)), citing the Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) (hereinafter OLRC Report); aff'd *Abdool* v. *Anaheim Management*, [1995] O.J. No. 16, (1995), 21 O.R. (3d) 453 at 462 (Div. Ct.) (hereinafter Abdool (2)).

Commonwealth jurisdictions including Canada,[16] England,[17] Scotland,[18] Australia[19] and South Africa.[20] As Lord Woolf observed, of England:[21]

> As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others.

[22] The Supreme Court of Canada recognized the inadequacies of the existing law in 1983 in the case of *Naken* v. *General Motors of Canada* when it identified "the need for a comprehensive legislative scheme for the institution and conduct of class actions."[22] According to the Court, the lack of detail in the historic "representative action" rule (in Alberta, rule 42) meant that it was not intended to impose a new and distinct method of proceeding upon the generally established pattern of procedure and was inadequate to launch a complex and uncertain action.

---

[16] Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (August 1996) (hereinafter CBA Report); Government of Manitoba, *Manitoba Civil Justice Review Task Force Report* (1996) (hereinafter Man Task Force Report); Government of Ontario, *Report of the Attorney General's Advisory Committee on Class Actions Reform* (1990) (hereinafter Ont Advisory Committee Report); British Columbia Ministry of the Attorney General, *Consultation Document: Class Action Legislation for British Columbia* (Victoria: Queen's Printer, May 1994) (hereinafter BC Consultation Document); ManLRC Report, *supra* note 8.

[17] Woolf Report, *supra* note 12.

[18] Scottish Law Commission, *Multi-Party Actions* (Report #154) (1996) (hereinafter SLC Report).

[19] The Law Reform Commission, *Grouped Proceedings in the Federal Court*, (Report No. 46) (Canberra: Commonwealth of Australia, 1988) (hereinafter ALRC Report); Victorian Attorney-General's Law Reform Advisory Council, *Class Actions in Victoria: Time For A New Approach* (Report, 1997) (hereinafter VLRAC Report); Marie Swain, "Class Actions in New South Wales," NSW Parliamentary Library Briefing Paper No 22/96 (hereinafter NSW Briefing Paper).

[20] South African Law Commission, *The Recognition of a Class Action in South African Law* (Report, 1997) (hereinafter SALC Report).

[21] ManLRC Report, *supra* note 8 at 1-2, quoting from the National Consumer Council in its submission to Lord Woolf's inquiry in England.

[22] (1983), 144 D.L.R. (3d) 385 at 410.

[23] The Alberta Court of Appeal recognized the inadequacies of the existing law in 1998 in the case of ***Western Canadian Shopping Centres* v. *Dutton***.[23] The Court applied rule 42 in this case, but commented, in passing, that "this area of the law is clearly in want of legislative reform to provide a more uniform and efficient way to deal with class action law suits."

[24] Because of the inadequacies, Albertans who face barriers to bringing their own action in Alberta are sometimes obliged to join litigation proceedings brought in other jurisdictions in order to obtain relief. For example, Alberta women who had silicone gel breast implant claims chose to join a British Columbia class action rather than attempt action under Alberta rule 42.[24]

[25] In assessing the situation in England and Wales, Lord Woolf concluded that "[the absence of specific rules of court for multi-party actions] causes difficulties when actions involving many parties are brought." He went on to observe that "[i]n addition to the existing procedures being difficult to use, they have proved disproportionately costly" and that "[i]t is now generally recognised, by judges, practitioners and consumer representatives, that there is a need for a new approach" to court procedures. We think that Lord Woolf's observations apply equally well to the current situation under Alberta's civil justice system.[25]

B. Ability of Existing Law to Handle the Growing Complexities

[26] At its simplest, ordinary litigation involves one plaintiff making a claim against one defendant. It is not unusual for litigation to involve a number of parties. A plaintiff or plaintiffs may sue several defendants. Additional plaintiffs

---

[23] (1998), 228 A.R. 188 (C.A.), leave to appeal to S.C.C. granted Dec. 9, 1999, [1999] S.C.C. Bulletin, p. 1977; S.C.C.A. No. 59, online: QL (AJ).

[24] *Harrington* v. *Dow Corning Corp.* (1996), 48 C.P.C. (3d) 28, 22 B.C.L.R. (3d) 97 (S.C.) (hereinafter Harrington (1)); *Harrington* v. *Dow Corning Corp.* (1997), 29 B.C.L.R. (3d) 88 (S.C.) (hereinafter Harrington (2)); *Harrington* v. *Dow Corning Corp.* (hereinafter Harrington (3), unreported (January 29, 1999), Vancouver C954330 (B.C.S.C.). An Alberta resident was the representative plaintiff for the non-resident subclass in *Chace* v. *Crane Canada Ltd.* (1996), 5 C.P.C. (4th) 292, aff'd 14 C.P.C. (4th) 197 (B.C.C.A.).

[25] Later in this chapter (heading D), we describe Lord Woolf's recommendations for rules revision to give the court more control over the case management of multi-party proceedings rather than for class actions legislation. The fact that he chose a different solution from that adopted in Canadian jurisdictions does not detract from the value of his observations on the problems with the existing law.

may be joined subsequently. A defendant may want to make a claim against another party (a "third party") who should be joined in the action. Sometimes, numerous individual cases raise the same or similar issues. This may lead to a decision to consolidate the cases into a single case to try several cases together so that evidence adduced in one case can be used in the others, or to try cases sequentially. One or more litigants may decide to put their case forward ahead of the others to serve as a test action, the results of which can be used as a precedent to guide the results at the trial of other cases or to assist settlement negotiations. At times, the number of claims in one proceeding may become so numerous as to be unmanageable. Cases may then be split off.

[27] To deal with the mounting complexities of litigation in modern society, additional procedural tools are being introduced. One example is the increasing use by the courts of case management. Another example is the development of an expanded class actions regime. A third example is the development of special rules for multi-party litigation.

[28] In this section (heading B), we examine existing procedures available to deal with litigation involving multiple parties. In the next section (heading C), we look at what other Canadian provinces are doing and at modern solutions in jurisdictions outside Canada.

1. Judicature Act, section 8: court power to avoid a multiplicity of proceedings

[29] The *Judicature Act*[26] gives the Court of Queen's Bench and Court of Appeal broad power to handle a matter so as to avoid all multiplicity of proceedings. Section 8 provides:[27]

> The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy

---

[26] *Judicature Act*, R.S.A. 1980, c. J-1.

[27] In *Anderson Exploration Ltd.* v. *Pan-Alberta Gas Ltd.* (1997), 53 Alta. L.R. (3d) 204 (Q.B.), the Court used this section to interpret rule 42 broadly on an application by the defendant to convert an action by nine of 425 natural gas producers to a representative action so that the decision would bind the remaining 416 producers.

> between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

Apart from the general jurisdiction of the court under section 8 of the *Judicature Act*, statutory authority to proceed by way of representative action, such that an action by one or more persons enures to the benefit of other members of a defined class, is usually restricted to specific narrow circumstances.[28]

2. Rule 42: representative actions

[30] Only one of Alberta's existing Rules of Court is intended for general use in cases involving a number of persons who have the same or similar claims against a defendant. That is rule 42. Rule 42 provides a procedural device for handling, in a

---

[28] Statutory provisions may authorize class proceedings in specific situations. (Modern class actions legislation excludes class actions authorized by other statutes from the operation of the ULCC Act, *supra* note 7, s. 41.)

Such proceedings are often found in commercial transaction legislation. In Alberta, the *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18, s. 10(1), permits one or more creditors to sue for rescission, or to have declared void, a transaction that has been impeached for fraud. It provides:

> One or more creditors may, for the benefit of creditors generally or for the benefit of those creditors who have been injured, delayed, prejudiced or postponed by the impeached transaction, sue for the rescission of, or to have declared void, agreements, deeds, instruments or other transactions made or entered into in fraud of creditors in violation of this Act or by this Act declared void.

The *Fair Trading Act*, S.A. 1998, c. F-1.05, s. 17, authorizes action by a consumer organization or a group of consumers against a supplier of goods or services for a declaration that an act or practice is an unfair practice and an injunction restraining the supplier from engaging in the unfair practice. The *Personal Property Security Act*, S.A. 1988, c. P-4.05, s. 53, requires that an action for the recovery of damages brought by a trustee under a trust indenture must be brought on behalf of all persons with interests in the trust indenture. The *Securities Act*, S.A. 1981, c. S-6.1, also has specific class proceedings provisions.

The *Fatal Accidents Act*, R.S.A. 1980, c. F-5, s. 3(1), enables a class action to be brought "for the benefit of the wife, husband, cohabitant, parent, child, brother or sister" of the deceased person. Ordinarily the action should be brought by the executor or administrator of the deceased person but if no action is brought within one year of the death, then the action may be brought, for the benefit of all, "by and in the name of all or any of the persons for whose benefit the action" could have been taken by the executor or administrator: *ibid.*, s. 3(2) and (3).

On occasion, a statute may provide a specific remedy that has a broader application than the individual plaintiff's case, making the statutory remedy preferable to a class action: Michael A. Eizenga, Michael J. Peerless and Charles M. Wright, *Class Actions Law and Practice*, looseleaf service (Toronto and Vancouver: Butterworths, June 1999) (hereinafter Eizenga, Peerless & Wright) at §2.9. An example is found in business corporations acts which give a right to obtain a share valuation.

single proceeding, litigation in which numerous plaintiffs (or defendants) are similarly situated, whether or not they are party to the action.[29] It provides:

> **Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.**

Where the"common interest" test is met, rule 42 allows a representative party to sue on behalf of a group of persons with claims (or defend on behalf of a group of defendants). Once appointed, the representative acts on behalf of all the members of the defined class, which includes persons who have not commenced litigation, and all members of the defined class are bound by the outcome of the case.[30]

[31] Rule 42 does not confer any new causes of action (or defences). It simply provides a procedure through which existing causes of action (or defences) can be

---

[29] The discussion in this report is confined to an examination of the law and practice under rule 42 (AR 390/68, s. 42). Rules 41 and 43 (AR 390/68, ss. 41 and 43), also provide for representative actions. Of these, rule 43 is the more widely known (to lawyers and members of the public), and the more widely used. It allows a trustee, executor or administrator to bring an action on behalf of the parties being represented without the necessity of joining the beneficial owner: *Paterson et al.* v. *Hamilton et al.*, [1997] 199 A.R. 399 (Q.B.). Rule 43 provides:

> **Trustees, executors or administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees, or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing those persons.**

Several other rules supplement it with operational details. The experience under rule 43 may be helpful to an understanding of what is meant and intended by rule 42: Stevenson and Côté , *Alberta Civil Procedure Handbook 2000* (Edmonton: Juriliber, 2000) (hereinafter Stevenson & Côté (2)) at 53.

Rule 41, which is the lesser known of the two, permits suit by a representative plaintiff in an action for the prevention of waste or protection of property. It says:

> **In any action for prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all other persons having the same or a similar interest.**

Rule 51 allows the court to appoint a representative to protect the interests of a class of persons who cannot be ascertained or readily ascertained, or though ascertained cannot be found, or though ascertained and found it would be expedient in the circumstances to do so for the purpose of saving expense.

[30] Stevenson & Côté, *Civil Procedure Guide* (Edmonton: Juriliber, 1996), vol. 1 at 296, citing *Macdonald* v. *Tor. (City)* 1897, 18 Ont. P.R. 17.

dealt with more effectively than through numerous individual actions. As Stevenson and Côté explain:[31]

> The idea is that instead of many lawsuits, or one lawsuit with many named parties, one person, or several representative persons can sue or defend on behalf of a group with a "common interest."

[32] The concept of special procedures where many persons have the same interest in the subject matter of the litigation originated in the Court of Chancery as an equitable remedy. Ordinarily, the Court required all parties to an action to be present "so that a final end might be made of the controversy."[32] However, the Court relaxed this requirement by allowing one or more representatives to conduct the litigation on behalf of others in cases where "the parties were so numerous that you never could 'come at justice'."[33] Later, when the courts of equity and common law were fused, that procedure was enacted in the Rules of Procedure Schedule appended to the *Supreme Court of Judicature Acts of 1873 and 1875*.[34]

[33] Rule 42 is similar to "representative action" rules that exist, or have existed, in other jurisdictions in the common law world. However, over the years, the courts have limited the scope of application of the historic Chancery rule.

[34] In 1983, in the *Naken* case,[35] the Supreme Court of Canada considered the scope of the representative action rule then in force in Ontario (similar to Alberta rule 42). It restricted the operation of the historic rule severely, requiring the following conditions to be met:

(a) the principal issues of law and fact are the same for each plaintiff;
(b) the class is clear and finite;
(c) there is a discernible fund or asset against which the claim can be made; and
(d) the plaintiffs claim the same remedy.

---

[31] Stevenson & Côté (2), *supra* note 29 at 52.

[32] *Duke of Bedford* v. *Ellis*, [1901] A.C. 1 at 8 (H.L.) *per* Lord Macnaghten.

[33] *Ibid.*

[34] *The Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict. 8, c. 66, Sch. Rule of Procedure, s. 10 and *The Supreme Court of Judicature Act, 1875* (U.K.), 38 & 39 Vict. 10, c. 77, Order XVI, First Sch., s. 9.

[35] *Naken* v. *General Motors of Canada Ltd.*, *supra* note 22.

In 1993, the Alberta Court of Appeal held that, for rule 42 to apply, the following four requirements must be satisfied:[36]

> (a) The class must be capable of clear and definite definition;
> (b) The principal issues of law and fact must be the same;
> (c) Success for one of the plaintiffs will mean success for all;
> (d) No individual assessment of the claims of individuals need be made.

A recent Alberta decision adds a fifth requirement that judgment in the action must be able to bind the parties (in this case, non-resident plaintiffs).[37] A still more recent case denies representational status to an organization whose membership was comprised of similarly – but not identically – situated claimants where the organization itself did not have a cause of action of its own against the defendants, no cause of action had been assigned to it, and it came into existence after the cause of action arose.[38]

[35] According to the Supreme Court of Canada,[39] the inadequacies of the historic representative action rule include that it does not address matters such as:

(1) assessing damages arising from many different situations;

(2) costs, especially with respect to non-parties (i.e., class members);

(3) access to pre-trial procedures by non-parties or by parties against non-parties or applying pre-hearing procedures to a reference (service of notice, modification of discovery rules and approval of settlements);

(4) the effect of the class action on a non-party's own right of action (lack of provisions for opting out, uncertain application of the *res judicata* doctrine); or

(5) the effect of the *Statute of Limitations* (uncertain application of limitation periods).

---

[36] *Korte* v. *Deloitte, Haskins and Sells* (1993), 8 Alta. L.R. (3d) 337 at 342. Contrast the earlier case of *Lunney* v. *Agostini* (1983), 27 Alta. L.R. (2d) 177 at 180 (Q.B.), in which Purvis J. distinguished "common interest" in Alberta's rule 42 from "same interest" in the comparable rule in other jurisdictions, saying that the use of the words "common interest" makes it "easier to support a class or representative action in this jurisdiction than in others that do not use the same term in the rule."

[37] *Interclaim Holdings et al.* v. *Timothy Down et al.* (23 November 1999), Alberta 9901-04122 (Alta. Q.B.), [1999] A.J. No. 1381, online: QL (AJ).

[38] *Holtslag* v. *Her Majesty the Queen in Right of the Province of Alberta* (23 May 2000), Alberta 9903-10452 (Alta. Q.B.) (the "pine shakes" case).

[39] *Naken* v. *General Motors of Canada*, *supra* note 22.

[36] Problems identified by lawyers in Alberta include:

Uncertain procedure. Rule 42 is ambiguous as to many of its procedural aspects. The current practice under rule 42 is difficult to discover. The practice under rule 42 is unpredictable.

Narrow Interpretation. The narrow interpretation the courts have given to rule 42 excludes cases that would benefit from a more certain and efficient procedure.

Examination for discovery. Whether or not the parties, including members of the class, will have the right to examine other parties for discovery is an important issue.

Limitation periods. Limitation periods can cause difficulty for both plaintiffs and defendants.[40] The disallowance of a representative action may give rise to limitation problems for individual class members later on.[41] To be certain to protect their claims against the possibility that an action will not be allowed to proceed as a class action, potential class members must commence individual actions before their limitation period for bringing an action expires.

Settlement. The mechanics of settlement are not clear. For example, under rule 344, for court intervention for settlement purposes and payment in discharge, all plaintiffs have to be involved. Defendants want to know whether the settlement will be a complete settlement.

Identification of the Class. Defendants want to know who is in the defined class. The rule 42 class must be capable of "clear and definite definition" but dispositions sometimes leave doubt.

---

[40] See *infra*, c. 4, headings Q and S.4.b.vi and S.4.d.vi.

[41] *Western Canadian Shopping Centres* v. *Dutton*, *supra* note 23 at 196 (Alta. C.A.); Stevenson and Côté, *Civil Procedure Handbook 2001* (Edmonton: Juriliber, 2000) (hereinafter Stevenson & Côté (3)) at 58.

__Costs__. Defendants want to know who will pay the costs if the action fails, and whether they can obtain security for costs.

__Distribution of award__. Defendants want to know who will scrutinize what goes out to potential plaintiffs.

3. Other procedures

[37] A variety of other procedural devices are of some use in cases where many persons have the same or a similar interest in the outcome of litigation. They include: test cases; group litigation; and a *potpourri* of other means.

a. *Test cases*

[38] One case that goes forward may serve to test the likely outcome in other cases. The court may use its power to stay (suspend) activity in other actions until the "test action" is determined.

[39] Advantages are that the results of the test case may lead to the efficient resolution of other litigation through settlement, or help narrow the issues that are litigated in subsequent cases. Moreover, the parties to the test case itself can probe the merits without the procedural complexity involved in a class action.

[40] Disadvantages include the following.[42] First, "[t]est case litigation puts inordinate power in the hands of the 'test' plaintiff" who will pursue the result that is most beneficial to that plaintiff personally. For example, the test case may be settled without a resolution of the underlying issues (as in the Dalkon contraceptive shield litigation) and therefore may "not necessarily facilitate the settlement of subsequent litigation." Second, "[t]est case litigation is not binding on the determination of either liability or damages except as between the parties named in the litigation." Of course, "a judicial resolution of test case litigation, particularly on the issue of liability, can influence the parties' willingness to settle." Third, American experience "indicates that the original litigants tend to reap a damages windfall."

---

[42] ManLRC Report, *supra* note 8 at 11.

b. Group litigation

[41] A group of plaintiffs with similar claims may agree to work together for the purpose of settlement negotiations with the defendant or advancing their cases. In effect, they create an informal class in order to work together.[43] Membership in the group is voluntary. The pine shakes litigation is a good example of an attempt to proceed by way of group litigation.[44] There, the claimants formed a voluntary association in order to work together in pursuing their claims.

[42] Many of the advantages and disadvantages of group litigation are similar to those discussed in connection with judicial case management of multiple-plaintiff similar-claim litigation (heading B.4). One difference is that group litigation is undertaken voluntarily whereas judicial case management may be imposed by the court.[45] In either situation, for the process to have any reasonable chance of success the persons in the group must be willing to cooperate.

c. Potpourri of other procedural tools

[43] Other procedures available to streamline litigation include: special determinations allowing for the resolution of legal matters without full discovery and trial procedures, the joinder of parties and consolidation of actions, and the law respecting capacity to sue and be sued.

> ***Special determinations***. Examples of special determinations include a court decision to appoint a plaintiff to represent class members in permitted circumstances where expedient (rule 51)[46] and summary judgment procedures (rules 159-164). These are helpful in some situations but are not universally appropriate for class actions.

---

[43] This has been called a "quasi" class proceeding: Clint G. Docken and Thomas W. Buglas, "Alberta's Mass Tort Malaise", a paper prepared for the Alberta CBA Mid-Winter Meeting 2000.

[44] *Holtslag et al.* v. *The Queen*, *supra* note 38.

[45] As was done in Alberta's wrongful sterilization and residential school litigation (described under heading B.4).

[46] This power may be exercised in proceedings concerning the administration of the estate of a deceased person, property subject to a trust, or the construction of a written instrument, including a statute. For an example of the exercise of this power where it would be inappropriate for the rule 42 plaintiff to represent certain beneficiaries as a class, see *Pratt* v. *Shyian*, [1989] A.J. No. 1018 (Alta. Q.B.).

Joinder of parties. A number of Alberta Rules provide for adding parties to an action (e.g., rules 36-40, 46 and 52-53). These rules are useful, but they "cannot replace class proceedings because they can result in cumbersome and expensive proceedings" for handling multiple plaintiff actions for the same or similar claims, this being "precisely what class proceedings legislation is designed to avoid."[47]

Consolidation of actions. The consolidation of actions under rule 229 may offer some of the advantages of class actions, particularly when the class is small. In a true consolidation, the actions are combined into a single action with one solicitor representing all claimants. But confusion may result because of the number of parties and their status as plaintiffs or defendants in relation to various claims and counterclaims.[48] As well, the right of litigants to choose their own solicitor should not be compromised. Instead of consolidating the claims into a single action, the court may decide to try two or more actions together, permitting evidence in one to be used as evidence in the others. A third alternative is for the court to try the cases consecutively so that the "actions are adjudicated by the same trial judge and, if possible, on the same general occasion of trial."[49] Difficulties with consolidation include that the consolidation of actions is unlikely to provide "a practical solution to the pre-trial problems that arise when there are numerous plaintiffs" and "this device [does not] facilitate settlement."[50]

Staying an action. The court has an inherent jurisdiction to order a stay of proceedings as a matter of judicial discretion exercised in accordance with established principles analogous to those considered in applications for the consolidation of actions and "test actions."[51] The purpose is to avoid a duplication of litigation. A stay of one case may be ordered where the issues in two cases are substantially the same, such that an adjudication in one action will automatically dispose of the issues in the second action.[52] However, a stay must be fair to both plaintiffs and defendants. For example, it ought not be used to delay the disposition of litigation involving other issues.

---

[47] ManLRC Report, *supra* note 8 at 13.

[48] *Athabasca Realty Co.* v. *Humeniuk* (1978), 14 A.R. 79 (T.D.) at 83.

[49] *Hagman* v. *Omar Holdings Ltd.* (1984), 55 A.R. 44 at 45, quoting from *Giberson* v. *Labatt Breweries of British Columbia*, [1980] 1 W.W.R. 93 (B.C.S.C.) at 96, appeal dismissed [1980] 2 W.W.R. 689 (C.A.).

[50] *Ibid.* at 9-10.

[51] *Her Majesty the Queen in Right of Alberta* v. *The Alberta Union of Provincial Employees* (1984),
(continued...)

Capacity to sue and be sued. Representative action may be "ideal for groups like unincorporated associations such as first nations, unions, or yacht clubs or, as rule 43 tells us, beneficiaries of an estate who can sue or be sued through the executor or administrator."[53] It enables collective entities that lack formal legal personalities to bring proceedings under the authority of a representative order. However, many issues are not addressed by such a provision. For example, for rule 42 to apply, the association itself must have a cause of action against the defendant.[54]

4. Judicial case management of multiple-plaintiff similar-claim litigation

a. *Growing use of judicial case management*

[44] Generally speaking, judicial case management is a relatively new phenomenon in Canada.[55] It is employed in cases where there is a need for judicial supervision or intervention on an ongoing basis. It can lead to streamlined procedures, faster timelines and earlier settlement. Other possibilities are: the diversion of cases to alternative dispute resolution where this is likely to be beneficial; the encouragement of a spirit of cooperation between the parties and

---

[51] (...continued)
53 A.R. 277.

[52] Allan A. Fradsham, *Alberta Rules of Court, Annotated, 1999* (Carswell: Toronto, 1999) at 437.

[53] Stevenson and Cote (2), *supra* note 29 at 52.

[54] ***Holtslag*** v. ***The Queen***, ***supra*** note 38 at para. [25]: "Finally, I agree with the position of the Crown that the Association is not a proper Plaintiff since it has no cause of action of its own, no cause of action has been assigned to it, and it came into existence after the cause of action arose."

[55] For a summary of the sources of authority for judicial case management in Alberta, see c. 4, heading H.2.

the avoidance of unnecessary combativeness; the identification and reduction of issues; and the reduction of cost.[56]

b. Use in multiple-plaintiff similar-claim litigation

[45] Judicial case management has been used effectively in Alberta cases involving multiple plaintiffs, either in conjunction with or independently of rule 42. Indeed, the Alberta Court of Appeal has expressed the view that "[s]ome of the problems encountered [under rule 42] could be dealt with through strict case management."[57]

i. The emerging Alberta model

[46] An Alberta model for "unified" judicial case management is emerging. It can be employed in cases involving many plaintiffs having the same or similar claims against the same defendant or defendants or against different defendants. This model makes creative use of a range of procedural tools that are available under the existing law, including those previously described. It had its genesis in the wrongful sterilization litigation, which was settled in 1999.[58] A similar unified

---

[56] Woolf Report, *supra* note 12.

[57] *Western Canadian Shopping Centres* v. *Dutton*, *supra* note 23 at 193.

[58] The following account is based on information gathered from the Hon. Allan H.J. Wachowich, Associate Chief Justice of the Court of Queen's Bench of Alberta, Mr. Jonathan P. Faulds, one of the plaintiffs' counsel; and Ms. Donna L. Molzan, counsel with Alberta Justice:

After 200 or more wrongful sterilization claims had been commenced against the Alberta government, Chief Justice Moore appointed a case management judge (Justice Wachowich) to handle them. Later, a trial judge (Justice Belzil) was appointed to deal with procedural matters relating to the eventual trial.

Defence counsel requested that a plaintiff committee be formed so that defence counsel would not have to deal with 60 or 70 individual lawyers. The plaintiff committee consisted of three counsel. Two of the counsel represented the majority of the claims and the third counsel communicated with the remaining individual lawyers, some 30 or 40 handling mainly smaller claims. A fourth counsel was appointed to handle claims for dependent adults who were under public trusteeship; these were all very similar and settled early. The judge and counsel set regular case meeting and target dates. The plaintiff committee also met regularly.

In order to bring as many claimants as possible into the process, potential claimants were served with notice asking them to come to court by a certain date if they wanted to be included. Many contacted did not want to claim (in effect, "opting out").

The situations of the plaintiffs were not all the same. For example, some of the plaintiffs were adults who had consented to the sterilization, some had children prior to the sterilization and some

(continued...)

judicial case management process is being followed in the residential schools cases now being litigated.[59] As well, counsel have been directed to consider how the thousands of actions in the pine shakes litigation should be managed.[60]

ii. How it works

[47] The Chief Justice of the Court of Queen's Bench appoints one judge to case manage claims of a similar nature made in separate actions, and another judge to hear pre-trial applications.

[48] Similar to group litigation in which parties group for their own purposes presumably to their own advantage, under the unified judicial case management model, the case management judge may require the plaintiffs (and the defendants, if there are several) to form a committee. The committees select the lawyers who will speak on their behalf, thereby reducing the number of lawyers who actively participate in the case management conferences.

[49] Case management conferences are scheduled as required. The conferences are held in open Chambers to allow the claimants and other members of the public to attend and view the process. In the residential school litigation, conferences have been held in Calgary, Edmonton and Lethbridge.

---

[58] (...continued)
were children whose parents had consented or requested the sterilization. With the concurrence of the case management judge, defence counsel and the plaintiff committee chose 17 or so cases to go forward and concentrated on the procedures necessary to deal with them. They set up a parallel track for other claims in order to keep them running. When the government appointed a negotiator for the defence, the plaintiff committee participated in the negotiations.

The case management required about a year of the judge's time. The Rules of Court were construed liberally for the purpose of expediting the proceedings. Interlocutory applications to the Court of Appeal objecting to some of the case management rulings slowed the process down, but overall, the process can be considered a success. It led to a satisfactory outcome for most claims (a few were not settled and may still be outstanding).

[59] See, e.g., case management orders issued by Justice T.F. McMahon, *In the matter of Certain Claims Arising From Indian Residential Schools and In the Matter of Case Management of the Residential School Claims*, Action No. 9901-15362 (Alta. Q.B.).

[60] *Holtslag* v. *The Crown in right of Alberta*, *supra* note 38 at para. [28]: "That is not to say that the impossibility of the Court being able to administer thousands of actions need not be addressed. On the contrary, it must. As the case management Judge, I direct counsel to address the matter, consult with one another, and advise the Court of the status of those discussions at the next case management meeting."

[50] Measures are taken in an effort to bring as many similar-claim plaintiffs as possible into the process. In the wrongful sterilization litigation, potential claimants were served with notice asking them to come to court by a certain date if they wanted to be included.

[51] The case management judge may ask plaintiff and defence counsel to identify a smaller number of cases that raise issues which are characteristic of those raised in other cases. From these cases, counsel and the judge select certain cases to go forward in advance of the others. The idea is that resolution of the issues in these cases will establish precedents on issues common to the other actions. These precedents will be available to assist the resolution of the remaining cases through negotiation and settlement.

[52] Other economies are also possible. For example, the case management judge may give directions for the cooperative and efficient sharing of discovery material.

c. Adequacy of Alberta's unified judicial case management model

[53] Some people think that the utilization of judicial case management in this way adequately serves the needs of Alberta litigants and that no additional procedural routes are needed. Indeed, many characteristics of this approach and the modern class actions reform adopted elsewhere in Canada and beyond are closely analogous.

[54] One advantage of Alberta's emerging unified judicial case management model is the flexibility it allows the parties to design their own procedure. Another advantage is that the parties continue to be represented by the lawyers of their choice. Individual representation, rather than reliance on a representative plaintiff, preserves the right of litigants to choose their own lawyer and participate in the proceedings.[61]

[55] Disadvantages include: each plaintiff must commence an individual action; it may not be possible to obtain the cooperation of all or a substantial number of

---

[61] Individual representation is also possible in a class actions regime in that potential class members have the option of pursuing relief on their own rather than joining the class action.

plaintiffs and defendants; there is lack of procedural certainty at the outset – for example, it may be premature to make decisions on joinder or consolidation until after discovery of many claimants; and the process of coming to agreement on how the group will conduct itself may be ponderous and time-consuming. The process does not permit the simplification that comes with designated representation of claims, nor does it bind litigants to the results of other actions. The innovations are strictly procedural; they do not include substantive law reform (e.g., each litigant must file an individual claim so that limitation periods do not continue to run against them).

[56] The emerging Alberta unified judicial case management approach is a welcome procedural innovation. In an appropriate case, judicial case management can offer some of the advantages of a class proceeding. The degree of judicial economy achieved is difficult to gauge. Moreover, like the practice under rule 42, the case management practice is uneven, being re-created case by case.

C. Precedents for Reform: Modern Class Action Laws

1. What is a class action?

[57] In an ordinary action, each litigant is a party in their own right. In a class action, one party commences an action on behalf of other persons who have a claim to a remedy for the same or a similar perceived wrong. That party conducts the action as "representative plaintiff." Only the "representative plaintiff" is a party. Other persons having claims that share questions of law and fact in common with those of the representative plaintiff are members of the "class." Once the class has been determined, the class members are bound by the outcome of the litigation even though, for the most part, they do not participate in the proceedings. A number of statutory safeguards and an expanded role for the court help to ensure that the interests of the class members are protected. Instead of multiple separate proceedings deciding the same issues against the same defendant or defendants in proceedings brought by different plaintiffs, class actions decide common issues in one courtroom at one time. Under modern Canadian legislation a court must approve ("certify") a proceeding as a class proceeding before it can go forward. These are the essential differences between an ordinary action and a class action.

2. Other Canadian jurisdictions

[58] The "vast majority of Canadians now have access to modern class proceedings regimes."[62] As stated in chapter 1, Quebec enacted legislation in 1978 (in force January 19, 1979), Ontario in 1992 (in force January 1, 1993)[63] and British Columbia in 1995 (in force August 1, 1995).[64] In addition to this, the Uniform Law Conference of Canada made recommendations for the adoption of a Uniform *Class Proceedings Act* in 1996, and the Manitoba Law Reform Commission made recommendations for class proceedings legislation in a report issued in January 1999. As well, in June 2000, the Rules Committee of the Federal Court of Canada issued a Discussion Paper proposing the adoption of a class proceedings rule and setting out its tentative decisions regarding the content of that rule.[65]

[59] The Ontario and British Columbia Acts, the Acts recommended by the Uniform Law Conference of Canada and the Manitoba Law Reform Commission and, one could add, the rule proposed by the Federal Court all "take pains to ensure that barriers to class proceedings (particularly barriers identified in the American or Quebec jurisprudence, or in decisions like that of the Supreme Court of Canada in *Naken*) are removed and minimized."[66] Other Canadian jurisdictions continue to use the historic representative action rule and other procedural mechanisms similar to those available in Alberta to handle cases where a number of plaintiffs have the same claim against a defendant.

[60] Under Canadian class proceedings regimes, as under rule 42, issues common to multiple plaintiffs are determined together through the device of a representative plaintiff. The effect is that "the proceedings directly affect persons

---

[62] ManLRC Report, *supra* note 8 at 15.

[63] The Ont Act, *supra* note 5 is based on recommendations made in OLRC Report, *supra* note 15, 63 and the Ont Advisory Committee Report, *supra* note 16. The OLRC recommendations were even more closely followed in the BC and ULCC Acts, *supra* note 6 and 7: James Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Toronto and Vancouver: Butterworths, March 1997) (hereinafter Sullivan) at 6.

[64] The BC Act, *supra* note 6 was enacted following consultation on the BC Consultation Document.

[65] FedCt DP, *supra* note 9.

[66] ManLRC Report, *supra* note 8 at 37.

not before the court (that is, all who may have a common claim)."[67] Like rule 42, class proceedings regimes do not confer any new causes of action.

a. Experience under modern Canadian regimes

[61] It can fairly be said of the experience under Canadian class actions regimes that "[s]o far, class action proceedings have evolved in a more or less balanced fashion."[68] Expanded class proceedings in Quebec, Ontario and British Columbia have "not spawned litigation that is excessively burdensome either in terms of the number of suits that have been brought or of their demand on court resources."[69] In Quebec, for example, where class proceedings were first introduced in 1979, the statistics indicate that:[70]

- class actions in Quebec are not massive or unmanageable;
- initially, certification was slightly more likely to be refused than granted but more recently, certification has become more likely to be granted than refused; and
- on a cumulative basis, judgments in actions that are certified tend to be in favour of plaintiffs.

Much of the credit for the balance can be attributed to the sensible approach being taken by the judges who are making the certification decisions and managing the conduct of class proceedings. To a large extent, however, discussion of the experience under modern Canadian regimes is hampered by the lack of "much systematic compilation of information."[71]

---

[67] *Ibid.* at 3-4.

[68] Julius Meinitzer, "Class Action Wars: Where the Big Fish Feed" (May 2000) *Lexpert* 85 (hereinafter Meinitzer) at 95.

[69] FedCt DP, *supra* note 9 at 15.

[70] *Ibid.* at 17-18. See also G.D. Watson, W.A. Bogart et al., *The Civil Litigation Process: Cases and Materials*, 5th ed. (Toronto: Emond-Montgomery, 1999), Chapter Seven "The Size and Scope of Litigation" at 615 citing S. Potter and J.-C. René "Class Actions: Quebec's Experience" in *New Class Proceedings Legislation* (Toronto: Insight, 1991); G.D. Watson, "Ontario's New Class Proceedings Legislation – An Analysis" in G.D. Watson and M. McGowan, eds., *Ontario Civil Practice 1999* (Toronto: Carswell, 1999).

[71] FedCt DP, *ibid.* at 15.

i. What types of claims have been brought?

[62] The class action cases that have been brought in Quebec, Ontario and British Columbia have arisen from a wide variety of circumstances. The Federal Court Discussion Paper summarizes the nature of these claims. The following examples illustrate the diversity of claims that have been brought in Quebec:[72]

- on behalf of lake-side residents for erosion of their shore;
- on behalf of patients in a hospital for damages suffered as a result of an illegal strike;
- on behalf of tenants to protect their entitlement to a rent subsidy; and
- for reimbursement of administrative costs, the charging of which had been held to be unconstitutional.

Ontario cases include:[73]

- tort cases, including products liability relating to breast implants, pacemakers, HIV contaminated blood, medical negligence causing hepatitis B, and the manufacture and sale of tobacco products;
- contract cases, including consumer complaints involving defective products such as vinyl siding, household dryers, improper calculation of interest rates on credit cards and utility bills and claims about "vanishing premiums" on life insurance policies; and,
- other cases, including pension cases, aboriginal land claims, breach of copyright, and an internal union dispute.

B.C. cases include "claims relating to overheating radiant ceiling panels, cracking toilet tanks, blood products contaminated with hepatitis C and silicon gel breast implants."[74]

ii. How frequently has class proceeding certification been sought?

[63] In Quebec, according to the Federal Court Discussion Paper, up to 1983, 110 certification motions had been initiated; by 1997 the number had grown to 396.[75] However, many of the motions that are initiated are not actually heard because they are settled beforehand: "For example, only five of these motions were

---

[72] *Ibid.* at 16-17, citing K. Delaney-Beausoleil, "Livre IX – Le Recours Collectif" in C. Ferland & B. Emery, *Précis de procédure civile du Québec*, vol. 2, 3e éd. (Cowansville: Editions Y. Blais, 1997) 737 at 739-743.

[73] Watson, *The Civil Litigation Process*, *supra* note 70 at 623. See also, G. Watson and M. McGowan, eds. *Ontario Civil Practice 2000* (Toronto: Carswell, 1999) SURVEY - 3 - 23.

[74] Watson, *The Civil Litigation Process*, *ibid.* at 615.

[75] FedCt DP, *supra* note 9 at 15, citing Fonds d'Aide Aux Recours Collectif, *Rapport Annuel* (1997-1998), Tables VI and VII.

heard on the merits in 1997; many class actions are resolved during the certification process."[76] In Ontario:[77]

> As of March 1999, research indicates that there had been 28 contested applications for certification in Ontario. In 14 cases, the court granted certification. In 12 cases, the defendant did not contest certification.

In addition to this, "several cases have been disposed of by motions brought prior to the motion for certification" (e.g., failure to state a cause of action, motions for summary judgment).[78] In B.C., as of March 1999, five of 10 contested certification applications had been successful and five certifications had proceeded by consent.[79]

iii. How successful have class proceedings been, once certified?

[64] In Quebec, actions which are tried on the merits have a strong chance of succeeding:[80]

> By 1997, 35 actions had been tried on the merits with 26 being resolved in favour of the class. However, these results are *presented on a cumulative basis*; the numbers of class actions tried in one year remains small. For example, in 1997, seven were tried on the merits, with five ending in judgments for the class and two ending in judgments rejecting the claims on behalf of the class.

Of course, this data does not reveal what proportion of actions are tried on the merits, what proportion are settled or what proportion fall by the wayside. In Ontario, as of March 1999, five class actions had proceeded through to judgment, with the class claim succeeding in two of these actions.[81] Nine actions were settled, seven as part of an uncontested certification. Nevertheless, as of mid-1998, the vast majority of actions remained unresolved.[82] In B.C., as of March 1999, three of the five certifications that had proceeded by consent were agreed to as part of a settlement of the claim on the merits.[83] Another case had been partially settled following certification.

---

[76] *Ibid.*

[77] Ward K. Branch, *Class Actions in Canada*, looseleaf service (Vancouver: Western Legal Publications, December 1998) (hereinafter Branch) at 4-54 to 4-55 (footnotes omitted).

[78] FedCt DP, *supra* note 9 at 19.

[79] Branch, *supra* note 77 at 4-56 (footnotes omitted).

[80] FedCt DP, *supra* note 9 at 17.

[81] Branch, *supra* note 77 at 4-55 (footnotes omitted).

[82] FedCt DP, *supra* note 9 at 19.

3. United States

a. Origin: Federal Rule 23

[65] The United States led the move to modern class proceedings legislation. Rule 23 of the United States Federal Rules of Civil Procedure, first adopted in 1938, is considered to have ushered in "the dawn of the modern age of class proceedings":[84]

> Rule 23 provided for the use of class actions to obtain both equitable and legal relief and provided guidance to the courts as to the types of actions that were appropriate for a class action. [Its adoption] promoted the use of class actions in the United States and provided authority for the binding nature of judgments on the class.

Federal Rule 23 was substantially broadened in the early 1950s and then again in 1966 when amendments:[85]

> ... significantly improved class action procedure and it became a popular method of resolving disputes. The new r. 23 dealt with such issues as the rights of class members and the methods of ensuring the fulfilment of those rights. The new rule also sought to ensure the fair and efficient conduct of class actions by providing the courts with broad discretion and powers to manage class actions.

[66] In addition to Federal Rule 23, individual states have introduced their own class actions regimes. These regimes generally follow the rule 23 lead, but details of the law and procedures vary from jurisdiction to jurisdiction.

b. Obstacles to understanding the American experience

[67] Gaining an accurate understanding of the American experience is not an easy matter. First, the laws differ from one jurisdiction to another. Second, as in Canada, there is a dearth of statistical information. This dearth is exacerbated by incomplete reporting of cases and no recording of class action practices.[86] Third, views on the American class actions experience differ dramatically. Perceptions

---

[83] Branch, *supra* note 77 at 5-46 (footnotes omitted).

[84] *The Law of 50 States*, quoted in Sullivan, *supra* note 63 at 2-3.

[85] Sullivan, *ibid.*

[86] Rand Institute, *supra* note 3 at 4.

vary depending on whether the source of information is published judicial decisions, the business press, or the general press.[87] Fourth, colourful anecdotes and intense political controversy, within as well as outside the legal community, fuel the often-heated discussion about the merits of class actions lawsuits:[88]

> The debate over damage class actions is characterized by charges and countercharges about the merits of these lawsuits, the fairness of settlements, and the costs and benefits to society. Anecdotes abound, and certain cases are held up repeatedly as exemplars of class actions' great value or worst excesses. In the fervor of debate, it is difficult to separate fact from fiction, aberrational from ordinary. The debate implicates deep beliefs about our social and political systems: the need for regulation, the proper role of the courts, what constitutes fair legal process. These beliefs exert such strong influence over people's reactions to class action lawsuits that different observers sometimes will describe the same lawsuit in starkly different terms. The protagonists disagree not only about the facts, but also about what to make of them. In a democracy such as ours, these kinds of controversies are extraordinarily difficult to resolve.

c. Changing class actions landscape

[68] In 1996, the Rand Institute for Civil Justice undertook a study of the dilemmas that have plagued class actions in the United States.[89] This account draws from that study.

[69] By 1996, shifts in the balance of power between plaintiffs and defendants in class action claims for money damages in the United States had caused a "full-scale political battle" to erupt.[90] ("Money damage class actions" are actions brought "for money, as opposed to suits seeking only injunctions or changes in

---

[87] *Ibid.* at 6.

[88] *Ibid.* at 3.

[89] *Ibid.* at 4 and 12: In order to assess the validity of the criticisms about class actions, the Rand Institute investigated factors that contributed to the inception and organization of class action lawsuits and their underlying substantive allegations; examined outcomes of the cases in detail; and studied notices, fairness hearings, judicial approval of settlements, and fee awards. It reviewed data available from: electronic sources and news media; interviews with leading class action practitioners; commentary on the 1966 federal Rules amendment and changes proposed in the 1990s; and a literature review. The Rand Institute also conducted intensive research on ten recently resolved class action suits in order to gain a richer understanding of class action practices, costs and benefits, and outcomes. The group included six consumer class actions, two mass product class actions, and two mass personal injury cases. The remarkable variation they found in these cases provided insight into the public policy dilemmas posed by damage class actions. However, the research did not tell anything about lawsuits that are filed and *not* certified.

[90] *Ibid.* at 1-2.

business or public agency practices."[91]) The protagonists and antagonists in this battle echoed the controversies of previous decades.

[70] Three major developments over time have affected the class actions landscape:

- First, the 1966 Federal Rule amendments introduced "opt out" class actions which replaced the previous "opt in" provision.[92] State law changes followed. Dispensing with the necessity for all potential plaintiffs to take an active step to join the litigation led to expanded plaintiff class sizes and increased plaintiff class leverage.

- Second, in the 1960s and 1970s, a wave of federal and state consumer rights statutes expanded the substantive legal grounds for money damage class actions, further shifting the class actions ground between plaintiffs and defendants. Today, as previously, corporate spokespersons object to actions seeking compensation for small financial losses. Other lawyers complain that too many consumer suits serve only to line the pockets of class action lawyers.[93]

- Third, in the 1980s, mass tort class actions (i.e., large-scale product defect litigation) appeared on the scene. This litigation comprises "large numbers of individual lawsuits, litigated in a co-ordinated fashion by a small number of plaintiff law firms, against a small number of defendants, before a few judges."[94] A consequence was that corporate defendants who "once ... clearly had the superior resources" now "faced organized networks of well-heeled tort lawyers."[95]

---

[91] *Ibid.* at 6.

[92] *Ibid.* at 1.

[93] *Ibid.* at 3.

[94] *Ibid.* at 1.

[95] *Ibid.* at 2.

[71] By the mid-1990s, there had been a "surge in damage class actions ... particularly in state courts and in the consumer area."[96] Damage class actions predominated over civil rights and other social policy reform litigation.[97] The shift toward consumer cases "gained impetus from the increasing availability of information on consumer complaints and regulatory investigations from the internet."[98]

[72] Class actions are currently in flux, such that "[i]t is not possible to determine whether the class action landscape will stabilize soon, or whether cases will continue to grow in number and variety."[99]

d. Criticisms of class actions

[73] Six core criticisms that are levelled at damage class actions in the United States[100] are similar to those raised during consultation on CM9. So as not to duplicate the arguments, we discuss those criticisms and the Rand Institute findings in response to them in chapter 3.

e. Rand Institute conclusions

[74] The Rand Institute concluded that one of the achievements of class actions legislation is to right the balance between well-resourced defendants and under-resourced plaintiffs. However, questionable practices by counsel occur frequently enough to deserve policymakers' attention. The "multiplicity of parties and high financial stakes of mass tort class actions exacerbate the incentive problems of class action practice"[101] – that is, the incentive for plaintiff lawyers to sue and seek settlement for personal gain, and for defendants to settle to avoid litigation costs and large damage awards. "Though judges have special responsibilities for

---

[96] *Ibid.* at 5.

[97] *Ibid.* at 6.

[98] *Ibid.* at 5.

[99] *Ibid.* at 8.

[100] *Ibid.* at 13.

[101] *Ibid.* at 11.

supervising class action litigation, they may not have the resources or inclination to scrutinize settlements for self-dealing and collusion among lawyers."[102]

[75] The difficulty of resolving the fundamental ideological conflict that surrounds class actions led the Rand Institute to suggest that it would be more productive to focus on the shared concerns about current damage class action practices:[103]

> We think this argues for refocusing the policy debate on proposals to better regulate such practices, so as to achieve a better balance between the public and private gains of damage class actions.

[76] The Rand Institute's proposed solution is to strengthen the judicial role by encouraging judges to:

- discourage the inappropriate use of the class action procedure;
- carefully scrutinize settlements, including the disposition of aggregate awards;
- monitor and control class counsel fees; and
- introduce mechanisms to improve class member participation.

f. Relevance of American experience to Canada

[77] The American experience with class actions is not the Canadian experience. However, it provides a valuable source of information for law reform purposes.

[78] Canadians generally approach class actions with "cautious optimism" that our class actions experience will not repeat the "roller-coaster excesses" of litigation in the United States.[104] Several attributes of American law and procedure that have contributed to these excesses are not characteristic of Canadian law and procedure. Seven differences stand out as particularly significant.

Juries in civil trials. The right to a jury trial is preserved by the Constitution in the United States and their use is fairly common. Some juries grant extremely high damage awards. In contrast, the use of juries in Canada is very limited.[105]

---

[102] *Ibid.* at 10.

[103] *Ibid.* at 25.

[104] Meinitzer, *supra* note 68 at 86.

Punitive and multiple damages awards. Damages awards in Canada are generally compensatory. Canadian courts take a more restrictive approach to damages for pain and suffering. When punitive damages are awarded, the amounts are relatively modest. Doubling or trebling damages awards is not common practice. In other words, generally, Canadian awards are not disproportionate to the actual economic damages. As a result, there is "proportionately less incentive to litigate" in Canada than in the United States.[106]

Strict liability doctrines for tort actions. The strict liability doctrines that apply to tort actions in the law of some American jurisdictions are not characteristic of Canadian law. This is another reason why there is less incentive to litigate in Canada.[107]

Contingency fees. In the United States, high contingency fees and the possibility of financial windfalls, create an incentive for plaintiff lawyers to pursue class actions as business ventures. In Canada, courts control the level of contingency fees. They keep them realistic in relation to the risk assumed in carrying the litigation and the effort expended. Court supervision of contingency fees also lowers the incentive for plaintiff lawyers to bring class actions.

Costs. In the United States, the only costs plaintiffs face are their own lawyer's fees and disbursements. They are not liable for the successful defendants' costs.[108] Under contingency fee arrangements, the plaintiff costs come out of the proceeds of the action if it is successful; otherwise, there is no liability. In other words, costs do not act as a disincentive to litigation that lacks merit. Plaintiffs may proceed with very limited risk whereas defendants must "weigh the cost and risk of defending an action against the cost of settling, knowing that there is no hope of recovering costs if the claim is found to be without merit."[109] As shall be seen in chapter 4, in Canada the effect of different cost provisions in Ontario and B.C. is yet to be played out.[110]

---

[105] It is possible that the use of juries might increase in Canada if plaintiffs saw an advantage in having them, subject of course to any legal restrictions that may exist on the use of juries.

[106] Barry A. Leon and Janet Walker, "Should businesses fear Canadian class actions?" *International Commercial Litigation* (London: March 1996), http://proquest.umi.com/pqdweb?TS=959368.

[107] ManLRC Report, *supra* note 8 at 13.

[108] Leon and Walker, *supra* note 106.

"Settlement-value only" actions. Under the "no costs" approach taken in the United States, the representative plaintiff assumes little or no risk. This fact makes it easy for entrepreneurial plaintiff lawyers to choose a nominal plaintiff and bring a "settlement-value only" action. A "settlement-value only" action is a lawsuit brought by plaintiff counsel in the hope of obtaining a settlement from defendants just to get the plaintiffs to go away.[111] Careful judicial scrutiny of the adequacy of the representative plaintiff should help prevent actions in Canada from being brought more for the benefit of the class lawyer than plaintiff class members. In a costs regime in Canada, the representative plaintiff carries the risk of having to pay a successful defendant's costs; in a no-costs regime, the representative plaintiff risks having to pay costs where improper conduct occurs. In either case, plaintiffs are likely to be reluctant to assume the costs risk. Careful judicial scrutiny of the adequacy of the representative plaintiff should also help prevent actions in Canada from being brought more for the benefit of the class lawyer than plaintiff class members.

Judicial supervision. Judges in Canada appear to be keeping a tighter rein on class actions litigation than judges in the United States. Although, in one respect, the Canadian certification rules are more liberal than the American

---

[109] *Ibid.*

[110] The Ontario class actions law provides for costs awards, but protects the representative plaintiffs who are responsible for the payment of costs by establishing a fund to which they can apply for funds to cover disbursements prior to disposition of the action and costs if the action is unsuccessful. The British Columbia class actions law adopts the American approach of no costs, but allows costs to be awarded where a party has behaved unreasonably. Experience over time will reveal whether plaintiffs see the treatment of costs in Ontario or B.C. as more advantageous.

[111] Meinitzer, *supra* note 68 at 94.

> rules (Canadian class actions law does not require the common issue to predominate), judges in Canada are "not certifying cases unless the economies ... justify the action."[112] In Canada, plaintiff counsel must persuade the court that a class action is the most efficient ("preferable") procedural vehicle for resolving the claims.

[79] In making our recommendations, we take heed of the difficulties that have been experienced in the United States and take care that our recommendations do not lead us into the same traps. While we are aware of these problems, we believe that the law and practice in other Canadian jurisdictions provides a closer analogy for Alberta.

4. Class actions in other jurisdictions

a. *Australia*

[80] Australia enacted "Representative Proceedings" legislation in 1991 (as Part IVA of the *Federal Court of Australia Act 1976*).[113] This legislation permits "representative proceedings in circumstances that extend well beyond what was traditionally regarded as the scope of the rule [governing representative actions]."[114]

b. *Studies recommending class proceedings legislation*

[81] Law reform bodies in several jurisdictions have recommended class proceedings legislation. We have already referred to the recommendations of the Uniform Law Conference of Canada and the Manitoba Law Reform Commission and the tentative decisions of the Federal Court of Canada Rules Committee, all of which adopt the model of the Ontario and British Columbia Acts. Class proceedings legislation has been recommended by the Victorian Attorney-General's Law Reform Advisory Council,[115] the Scottish Law Commission,[116] and

---

[112] *Ibid.* at 86.

[113] The legislation arose from recommendations made in the ALRC Report, *supra* note 19.

[114] NSW Briefing Paper, *supra* note 19 at 20, citing Gleeson CJ in *Esanda Finance Corporation Ltd* v. *Carnie & Anor* (1992), 29 N.S.W.L.R. 382 at 388.

[115] VLRAC Report, *supra* note 19.

[116] SLC Report, *supra* note 18.

the South African Law Commission.[117] Various bar and government studies have also led to recommendations for the enactment of class proceedings legislation.[118]

5. Summary

[82] Many jurisdictions have found the old representative action rule to be inadequate and have chosen to enact modern class actions legislation to overcome the inadequacies. Included among such jurisdictions are Quebec, Ontario and British Columbia. This approach to handling some of the complexities of modern litigation has much to commend it. However, a shortcoming of modern class actions laws is that the courts still have to deal with mass non-class litigation. This shortcoming led England's Lord Woolf to recommend a different approach. We describe that report in section D.

D. Precedents for Reform: England's GLO Rules

[83] The British government (Lord Chancellor) commissioned Lord Woolf to conduct a far-reaching inquiry into the operation of the civil justice system. He issued his report, *Access to Justice*, in 1996. Chapter 17 of that report recommended a new procedure for handling "multi-party actions." Many of Lord Woolf's recommendation were implemented in the new civil procedure rules that took effect in England on April 26, 1999.[119] The new rules, in part 19, make special provision for a "group litigation order" (GLO). The GLO Rules came into force May 2, 2000.[120] We will summarize the course of events.

1. Supreme Court Rules 1965

[84] Prior to Lord Woolf's study, courts in England had adopted an approach analogous to Alberta's unified judicial case management approach: "[T]he Supreme Court Rules 1965 ... permitted (with the application of judicial ingenuity

---

[117] SALC Report, *supra* note 20.

[118] See e.g., *supra* note 16.

[119] United Kingdom, *Civil Procedure Rules 1998*, available at: http://www.open.gov.uk/lcd/civil/procrules_fin/crules.htm. The new rules have been described as "revolutionary": Simmons & Simmons, *The Woolf Reforms: Commentary*, http:/www.simmons-simmons.com/woolf/woolf.htm.

[120] Simmons-Simmons, *The Woolf Reforms: New Guidance for Multi-Party Actions*, http://www.simmons-simmons.com/woolf/actions.htm.

and an element of cooperation between the claimants and between the claimants and defendants) the creation of a single action, or series of actions, through the use of the representative action; joint proceedings; consolidation of proceedings; the test case or lead action; and the assignment of several similar cases to a single judge."[121]

2. Lord Woolf's Report

[85] In light of the practice that had been developed under the 1965 Supreme Court Rules, Lord Woolf rejected the representative plaintiff "class action" approach initiated in the United States by Federal Rule 23. He recognized that there are "clear advantages in drawing together claims which may be in some way related" but favoured the use of case management which gives the court the flexibility to deal in different ways with cases that have been drawn together. This having been said, Lord Woolf recommended the inclusion of certain features in a case management structure specially designed for use in multi-party situations (MPS). Many of these features resemble those contained in "American-style class actions." Primary features include provision for:

- bringing multi-party situations to the court's attention as soon as possible
- joining the class (litigants can 'opt in' by entering their cases on a register)
- certifying the proceeding as an MPS (court confirms that the MPS criteria have been met)
- appointing a managing judge to ensure the expeditious and economical progress of litigation, including
    - identifying main and preliminary issues
    - determining the order of proceeding between generic and individual issues
    - drawing up a strategy for disclosure, further investigative work, and the use of expert evidence
    - establishing a timetable

---

[121] *The Woolf Reforms in Practice: Freshfields assess the changing landscape* (Butterworths, 1998) at 45.

    - defining the group (establishing criteria to identify individuals who may join the action)
    - considering the utility of sub-groups, lead cases or sampling
    - considering whether the MPS should be managed on an 'opt-out' basis
    - directing notice of the action
    - establishing a filter by agreeing with the parties on diagnostic or other criteria that will facilitate the identification of valid claims and the early elimination of weak or hopeless claims
    - determining the approach to costs
    - adopting a less formal approach to proceedings in order to encourage a more cooperative atmosphere of mutual endeavour
- giving the court a role in protecting the overall interests of litigants, including
    - protecting against conflicts between interests of counsel and group members
    - appointing a trustee to represent interests of group members where
        - no formal group represents the interests of claimants, or
        - the litigants' interests require separate representation
    - approving all multi-party settlements

The Woolf recommendations do not address the issue of introducing complementary substantive law changes by enacting legislation to accompany the rules reform.

3. GLO Rules

[86] The GLO Rules[122] and accompanying Practice Directions[123] allow either party to apply for, or the court on its own initiative to make, a GLO.[124] "Making a GLO" is analogous to certifying a class action. It is available to provide for the case management of claims which give rise to common or related issues of fact or law (the "GLO issues").[125] A managing judge is appointed as soon as possible.[126] The GLO identifies the GLO issues that will cause cases to be managed as a group under the GLO and may direct how the GLO is to be publicized.[127] Once a GLO has been made, persons wishing to join the group may enter their cases on a register set up for that purpose. A judgment or order on a GLO issue binds the parties on the register but a party who is adversely affected may seek leave to appeal.[128] A party to a claim entered after the judgment or order is granted may apply to be excepted from it.[129] Document disclosures by a party to a GLO issue are disclosures to all parties then on the group register, or later added to it.[130] The management court has wide power to give case management directions. These include:[131]

> (a) varying the GLO issues;
>
> (b) providing for one or more claims on the group register to proceed as test claims;
>
> (c) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants;
>
> (d) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met;

---

[122] United Kingdom, *Civil Procedure Rules*, *supra* note 119, rules 19.10-19.15.

[123] United Kingdom, *Civil Procedures Rules*, Practice Direction 19B – Group Litigation, available at: http://www.open.gov.uk.lcd/civil/procrules_fin/pdp-19b.htm.

[124] *Ibid.*, PD 19B/3.1 and PD 19B/4.

[125] *Supra* note 119, rules 19.10 and 19.11(1).

[126] *Supra* note 123, PD 19B/8.

[127] *Supra* note 119, rule 19.11(2) and (3).

[128] *Ibid.*, rule 19.12(1) and (2).

[129] *Ibid.*, rule 19.12(3).

[130] *Ibid.*, rule 19.12(4).

[131] *Ibid.*, rule 19.13.

> (e) specifying a date after which no claim may be added to the group register unless the court gives permission; and
>
> (f) for the entry of any particular claim which meets one or more of the GLO issues on the group register.

This provision supplements the general case management powers of the court which are contained in Part 3 of the new *Civil Procedure Rules*. The court also has power to remove a party from the register and to give directions about future management of the claim.[132] Where a test claim is settled, the court may order the substitution of another claim in its place and an order made in the first test claim will be binding on the substituted claim unless the court orders otherwise.[133]

[87] The GLO rules are very new. A body of experience under them will need to be built up before their operation and effect can be meaningfully evaluated.

E. Conclusion

[88] The growing complexities of litigation in modern times pose challenges for the civil justice system. Different jurisdictions have taken different approaches to meeting those challenges. The approach most widely-adopted is to introduce modern class actions provisions, by way either of modification of the rules of court or statutory enactment.

[89] As they have in other jurisdictions, the courts in Alberta face the challenges of the growing complexities of litigation. These complexities give ample grounds to support consideration of the question whether there is a need for reform in Alberta and, if there is a need, what approach to reform should be taken.

---

[132] *Ibid.*, rule 19.14.

[133] *Ibid.*, rule 19.15.

CHAPTER 3. NEED FOR REFORM

A. Basic Social Policy

[90] The need for reform was the most contentious issue we faced in consultation on CM9. This is not surprising, given a knowledge of the experience in the United States.

[91] In Alberta, as in the United States, two ideological views appear to clash.[134] Those persons holding one view believe that the social costs of class actions outweigh their social benefits. They argue that reliance should be placed on individual litigation to secure financial compensation for individual losses and on government regulation to prevent wrongs. Those persons holding the other view believe that the social benefits of damage class actions outweigh their costs. They argue that the cost of individual litigation deprives many people of a remedy because they can't afford to go to court. They are not prepared to leave the enforcement of standards to government. Collective action is the only practical way for them to assert their rights.

[92] As stated in chapter 1, our recommendations are founded on an acceptance of the view that the basic social policy underlying the civil justice system is to provide legal remedies for legal wrongs. In most situations, this involves compensating persons who have been wronged by others with an award of money damages. The legal wrong giving rise to the remedy may stem from a breach of contract, tort or other legal cause. Awarding compensation may also have a deterrent effect on future conduct.

B. Procedural Objectives

[93] From a procedural perspective, in applying the basic social policy, it is necessary to ask what is in the best interests of Albertans in multiple-plaintiff similar-claim actions. Is the traditional representative action rule (rule 42) satisfactory? Does rule-based case management offer a solution? Would modern

---

[134] Rand Institute, *supra* note 3 at 2-3.

class actions legislation provide a better procedural vehicle? What are the consequences for society over all of one solution or another?

[94] The objective should be to ensure that Alberta's civil justice system fulfills the fundamental principles of a good civil justice system in situations where multiple plaintiffs have the same or similar claims against one or more defendants. These principles have been stated by others.[135] They are to ensure that Alberta's civil justice system handles complex modern litigation in a way that is fair, certain and efficient.

[95] We apply these principles in assessing the adequacy of the existing law for handling litigation involving multiple plaintiffs having similar claims. We also apply these principles in considering the advantages or disadvantages of any proposals for change.

1. Plaintiffs should be able to bring deserving claims

[96] The principle that plaintiffs should have access to bring deserving claims involves the elements identified in the Alberta Summit on Justice: expediting the current justice process, making it more affordable, and finding ways to simplify it so that it is more "user friendly" and less complicated and intimidating.[136] The goal of providing better access to justice for plaintiffs is one that has been identified in many discussions on the limitations of the existing law. The Ontario Law Reform Commission spoke of "the goal of permitting the advancement of meritorious claims which have heretofore been uneconomical to pursue because the damages for each individual plaintiff would be too small for each claimant to recover through usual court procedures."[137] Lord Woolf spoke of providing "access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically

---

[135] See e.g., CBA Report, *supra* note 16, c. 3; Government of Ontario, *Civil Justice Review*, Supplemental and Final Report (November 1996) at 3, First Report at 4; Woolf Report, Section 1: Overview.

[136] Alberta Summit on Justice, *supra* note 13 and accompanying text.

[137] Quoted in *Abdool* v. *Anaheim Management Ltd.* (1), *supra* note 15.

unviable."[138] Several reports have spoken of providing access to justice for persons who, for social or psychological reasons, fail to pursue legal remedies to which they are entitled.[139]

2. Defendants should be protected from unreasonable claims

[97] Attention to the principle that defendants should be protected against unreasonable claims will ensure that the procedural balance is not tipped too far on the side of the interests of plaintiffs. The principle embodies the idea that defendants should not have to spend money or face adverse publicity as a result of unfounded claims brought against them. Further, the principle encompasses the idea that, where plaintiffs are able to make out a recognized cause of action, the civil justice system should provide defendants with an opportunity to make their defence in a proceeding in which the rules are known, and the results can be predicted with a reasonable degree of certainty, obtained within a reasonable length of time and limited in cost – all of which accords with our third principle, that the civil justice system should be certain and efficient.

3. The civil justice process should be certain and efficient

[98] A good civil justice system embodies the goal of "judicial economy" which has often been identified by others. The Ontario Law Reform Commission spoke of "the goal of resolving a large number of disputes in which there are common issues of fact or law within a single proceedings to avoid inconsistent results, and prevent the court's resources from being overwhelmed by a multiplicity of proceedings" and of "an economy of scale" that can come from "permitting a representative plaintiff to sue for damages for an entire class."[140] Lord Woolf spoke of providing "expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved means that the cases cannot be managed satisfactorily in accordance with normal procedure."[141]

---

[138] Woolf Report, *supra* note 12 at 223, para. 2.

[139] See e.g., ManLRC Report, *supra* note 8 at 1-2. The OLRC made a similar observation.

[140] Quoted in *Abdool* v. *Anaheim Management Ltd.* (1), *supra* note 15.

[141] Woolf Report, *supra* note 12 quoted in ManLRC Report, *supra* note 8 at 3.

The success of this objective should be measured not merely by dollars spent but by dollars well spent.[142] It goes far beyond judicial calendar-clearing.[143]

C. Adequacy of the Existing Law

[99] In chapter 2, we drew attention to several shortcomings of the existing law. These were identified in:

- statements made by the Supreme Court of Canada and Alberta Court of Appeal about the limitations of the traditional representative action rule (rule 42) to provide for modern class actions;[144]

- observations made by Alberta lawyers about rule 42 and any future class action procedures, which included issues relating to uncertainties about the process, narrow judicial interpretation, the right to examine class members for discovery, the protection of limitation periods, the mechanics of settlement, the need for clarity about the composition of the class, liability for costs, and supervision of the distribution of an award;[145]

- an assessment of various shortcomings of other rules and procedures to handle mass non-class litigation;[146] and

- a discussion of some inadequacies of case management alone.[147]

We mentioned that, because of the restrictions on rule 42, Alberta citizens have sometimes been obliged to pursue their claims in other jurisdictions.

---

[142] Rand Institute, *supra* note 3 at 35.

[143] *Ibid.*

[144] SCC in *Naken, supra* notes 22 and 35 and accompanying text; Alta. C.A. in *Western Canadian Shopping Centres* v. *Dutton, supra* note 23 and accompanying text.

[145] *Supra* p. 17, para. [36].

[146] *Supra* pp. 17-19, paras. [36] to [43].

[147] *Supra* pp. 24-25, paras. [53] to [56].

[100] Our consultation reinforced the view that the existing law is not adequate. The following comments were characteristic:

- Class actions reform is needed to provide improved access to justice.

- The existing rule 42 is cumbersome for both counsel and the courts such that meritorious claims by individual plaintiffs are often economically unviable in Alberta.

- Class actions legislation is essential to providing the general public with access to justice.

- The existing rule 42 has been judicially interpreted in such a way as to make it ineffective as a practical procedure for bringing on mass representative proceedings.

[101] Nevertheless, some respondents expressed reservations about expanded class actions reform. They stressed four points:

- ***Class actions reform should start with fundamental policy questions.*** In thinking about reform, these respondents admonished us to begin by addressing fundamental policy questions about what is wrong with the existing law, what problems we are trying to solve, where we want to end up and what our vision is for the future.

  To these questions we respond that our vision for the future is a more just society – one in which the justice system will provide legal remedies for legal wrongs and in which wrongdoers will not profit unjustly. A major problem is that the existing law precludes some plaintiffs from bringing deserving claims. There are at least two reasons for this. The main reason is that the cost of going to court makes pursuing justice impractical and uneconomical for many plaintiffs. Another reason is that some plaintiffs are deterred from seeking relief by psychological barriers. If plaintiffs are unable to bring deserving claims, justice is denied and defendants are left to profit from their wrongdoing.

- ***Class actions reform should take account of the cost to society.*** The argument is that society would bear additional costs if class actions were to permit claims that would not be brought under the existing law.

  To this concern we respond that the claims being objected to are the claims that persons do not bring today because they are uneconomical to pursue or because psychological barriers block access to justice. We would be reluctant to say with respect to these claims that it is better in principle for people to suffer injustice for the common economic benefit than to improve the means through which they may obtain justice.

- ***Used creatively, the existing law can provide what is needed.*** This argument states that claims are being handled now through actions brought one at a time or in organized groups (mass non-class litigation). Lawyers and judges are doing a good job. People are getting compensation.

  We respond that, while this is true to a large extent, if it were universally true we would not be hearing so many complaints about the lack of access to justice. Judges and lawyers are to be commended for the job they are doing, working within the confines of the existing law and procedures. Nevertheless, new procedures may be able to enhance the justice achieved and improve the efficiencies of the existing system.

- ***Class actions reform should not import American law.*** The argument is that the expansion of class litigation in Quebec, Ontario and British Columbia brings with it the negative consequences of the American experience.

  We make two responses to this point. The first response is that the Canadian legal environment is different enough from the American to reduce or eliminate some of the concerns. The second response is that, as stated in chapter 2, we take care to avoid making recommendations that will lead to a repeat of the problems that have arisen under the American law.

[102] In summary, we have found that there is general support for reform of the existing procedures governing multiple-plaintiff similar-claim actions in Alberta.

We are not persuaded that the concerns expressed by persons who question the need for reform tip the balance against reform, although we remain alert to these concerns in chapter 4 where we frame our detailed recommendations for reform. Our position is that reform is needed and we recommend that reform take place.

RECOMMENDATION No. 1
The existing law governing proceedings involving multiple plaintiffs with similar claims against the same defendant or defendants should be reformed.

D. Reform of Class Actions

1. The options

[103] A consequence of our conclusion that the existing law is inadequate to handle multiple-plaintiff similar-claim litigation is that reform is needed, but how should this reform be achieved? We see three choices. They are to further develop Alberta's emerging unified judicial case management model, otherwise amend the Alberta Rules of Court or introduce a modern class actions regime.

a. Further develop Alberta's emerging unified judicial case management model

[104] The emerging Alberta approach to unified judicial case management, described in chapter 2, makes creative use of the existing rules with some encouraging results.[148] Many characteristics of this case management approach and the modern class actions reform adopted elsewhere in Canada and beyond are closely analogous.[149]

[105] Its advantages include flexibility and individual representation.[150] Disadvantages are: filing of multiple individual actions – hundreds or even thousands; *ad hoc* case by case development giving procedural uncertainty; determining the appropriate process can be slow and cumbersome; outcomes of

---

[148] *Supra* pp. 22-24, paras. [45] to [52].

[149] England's new Civil Procedure Rule based on recommendations in the Woolf Report, *supra* note 12; *see also* Sarah L. Croft and Karen A. Brady, "Multi-Party Litigation in the United Kingdom and the United States" (April 1997) *For the Defense* 8 at 9-11.

[150] *Supra* p. 24, para. [54].

cases advanced for decision are precedential but not binding; and the case management model does not produce substantive law changes.[151]

[106] As stated in chapter 2, we view the emerging Alberta approach to unified judicial case management as a welcome procedural innovation. This procedure is especially useful because it can be in litigation involving multiple plaintiffs with similar claims against the *same* or *different* defendants. The courts are doing an exemplary job. We think that they are best left to their creative devices at this stage. Formalizing the current practice would deprive the model of its main advantage which is its flexibility to design procedures suited to the circumstances of the particular litigation. We are aware that some members of the legal profession would like to have more certainty in some procedural aspects of unified judicial case management.[152] It is possible that the structure, or some of its elements, will be formalized at some time in the future, as it has been under the new GLO rules in England. However, making recommendations with regard to that possibility lies beyond the scope of this project.

b. Otherwise amend the Alberta Rules of Court

[107] Some respondents indicated that modifications within the existing rules would be sufficient. Respondents advocating this approach voice reservations about the direction in which class actions reform is taking us as a society. Nevertheless, they see some merit in reforming rule 42 in order to clarify and reform class procedures under the Rules of Court.

[108] Regrettably, we did not receive any specific suggestions about changes to the rules, so we don't know which rules respondents advocating this approach would modify or in what manner. However, one point is that rules changes are limited to procedural reform. Unless the changes were accompanied by statutory provisions, this choice would preclude the introduction of substantive law changes. For example, rules changes could not confer power on the court to suspend limitation periods or make aggregate damage awards. Although current legislation

---

[151] *Supra* p. 24, para. [55].

[152] Information received from participants at the ALRI Invitational Consultation Session, *supra* note 2.

could be amended to introduce substantive law changes,[153] we do not agree with the idea of approaching reform in this area in a fragmentary fashion.

c. *Introduce a modern class actions regime*

[109] A third option would be to introduce a modern class actions regime. As stated in chapter 2, this is the choice made by other jurisdictions in Canada and by many jurisdictions elsewhere. Using the device of a representative plaintiff, such regimes provide a structure for the determination of common issues in a single proceeding. Where individual issues arise, the regimes permit them to be dealt with individually to the extent that they are different. They add a tool to the kit of procedural tools traditionally available for handling civil litigation. Modern class actions regimes contain strong elements of case management of the sort now being used by Alberta courts, but set that case management within a framework designed specifically for litigation involving multiple plaintiffs each having the same or similar claims against the same defendant or defendants.

[110] This approach received strong support from the persons consulted. However, once again, that support was not unanimous. Some of the persons consulted thought that the existing law and procedures were adequate to handle the complexities of modern litigation involving multiple plaintiffs having similar claims. Some were opposed to any proposal which might increase the liability or exposure of defendants to liability beyond what it now is.

[111] Before reaching a conclusion about which choice to recommend, we consider some of the potential benefits and risks of enacting modern class actions legislation.

2. Potential benefits of class action regimes

a. *Benefit to society*

i. Arguments for class actions

[112] Those in favour of class actions reform claim that society overall stands to benefit in at least three ways from the availability of modern class actions laws. They are: increased judicial economy achieved by decreasing the multiplicity of

---

[153] For example, amendments to limitations law might be made in the *Limitations Act*, R.S.A. 1980, c. L-15.1; amendments to permit aggregate damage awards might be made in the *Judicature Act*, R.S.A. 1980, c. J-1.

proceedings; the enhancement of justice; and greater deterrence of wrongdoing. Arguments made in support of each of these benefits are set out in the following three paragraphs.

[113] ***Increased judicial economy***. Modern class action regimes provide a simple and efficient mechanism to deal with a large number of claims involving common issues of fact or law within a single proceeding. In this way, they prevent court resources from being drained by a multiplicity of costly and time-consuming proceedings raising similar issues.

[114] ***Enhancement of justice***. Modern class actions have the potential to benefit society by enhancing justice in a number of ways. One way is by improving access to justice, thereby contributing to a more just society. Another way is by avoiding inconsistent results in cases brought by individual plaintiffs who have similar claims. Yet another way is by using case management, including alternative dispute resolution mechanisms, to reduce adversity and increase the likelihood of reaching a fair and equitable result.

[115] ***Greater deterrence of wrongdoing***. As American experience shows, persuading potential wrongdoers to avoid wrongs is a useful by-product of a modern class action regime. One effect of class actions in the U.S. has been to cause corporations to review their financial and employment practices and manufacturers to pay closer attention to their product design decisions.[154] Even if the regulatory enforcement of standards is not a core purpose of class actions procedure, many believe it is a useful by-product.

ii. Arguments against class actions

[116] While agreeing that increased judicial economy would benefit society, persons who question the wisdom of class actions reform reminded us that it is important to consider the many interests that require balancing. These interests include the need to balance the costs of litigating class actions against the benefits to the class.[155]

---

[154] Rand Institute, *supra* note 3 at 9.

[155] *Infra* p. 61, paras. [141] to [142].

[117] With respect to improved access to justice, they argue that the remedy should not be disproportionate to the wrong. In the interests of justice, they also argue that protective mechanisms need to be in place to prevent large corporations or others with deep pockets from being victimized by "strike" actions and fishing expeditions. In a strike action, a class proceeding is commenced "where the merits of the claim are not apparent but the nature of the claim and targeted transaction is such that a sizeable settlement can be achieved with some degree of probability" because the defendant chooses to defray the costs of litigating or the public relations consequences by settling.[156]

[118] With respect to the deterrence of wrongdoing, they point out that mechanisms such as consumer protection legislation already discipline companies in the market place. They argue that the regulatory enforcement of corporate conduct is a matter for government, not the courts, and that this is particularly so in consumer cases in which each class member claims a small loss but the sum of the losses is huge. The argument, in effect, is that these cases should not be litigated at all. They suggest that a better solution might be to reverse the trend toward enforcement through private action by bolstering government regulation. Governments have access to a wide spectrum of information and to experts who can make decisions based on sound economic opinion whereas courts are limited to the evidence before them and therefore don't see the "world view." They make the further point that problems involving many individual differences, as was the situation with respect to the leaky condos in Vancouver, are not helped by class actions and may be better dealt with through increased government regulation.

b. Benefit to plaintiffs

[119] ***Improved access to justice*** is the main benefit of modern class action regimes for plaintiffs. By permitting a representative plaintiff to sue for damages for an entire class, modern class actions open the way to the advancement of deserving claims that are uneconomical to pursue under the existing law. They provide a means to sue defendants who might otherwise, practically speaking, be immune from suit. That is because when claimants join forces the total claim may become substantial enough to justify the expense of the litigation. The size of the claim may enable claimants to take advantage of contingency fee incentives in

---

[156] Meinitzer, *supra* note 68 at 91.

order to secure well-qualified lawyers, expert witnesses, and other resources needed to go to court. Allowing suit by a representative plaintiff also helps obtain remedies for persons when psychological barriers impede their access to justice.

c. Benefit to defendants

[120] Modern Canadian class action regimes offer economies of scale and other advantages to defendants as well as plaintiffs. We will highlight four advantages.

[121] ***Avoid multiple related lawsuits***. By reducing the multiplicity of proceedings, defendants gain the possibility of resolving the entire controversy in a single trial instead of facing the cost and inconvenience of defending multiple related actions, possibly brought over long periods of time and in different jurisdictions.

[122] ***Gain early opportunity for closure***. Rather than waiting for individual claims to pile up, corporate defendants can clean up their liabilities in one proceeding, without risking inconsistent decisions or facing multiple lawsuits in numerous jurisdictions.

[123] ***Permit negotiated certification***. In the words of one Ontario defence counsel, "... a negotiated certification can provide defence counsel with the opportunity to influence the nature of the class, limit the claims being asserted, and establish an expeditious and inexpensive process for resolving the claims of each of the plaintiffs in the class."[157]

[124] ***Achieve class-wide resolution***. Defendants sometimes see class-wide resolution, preferably through settlement, as advantageous. Modern Canadian class action regimes provide closure on liability and compensation issues, subject only to the "opting out" procedure. Asthe Rand Institute has observed:[158]

> In the face of these criticisms, it is worth noting that defendants sometimes see class-wide settlement as advantageous and favour as broad a definition of the class as possible. Some defendants even seek certification in order to bind class members definitively.

---

[157] *Ibid.* at 95, quoting Jeffrey Goodman of Heenan Blaikie.

[158] Rand Institute, *supra* note 3 at 15.

3. Potential risks of class action regimes

[125] Several potential risks of class actions reform were raised during consultation. Some of the risks are based on accounts of American experiences of the kind studied by the Rand Institute.[159] Because of the differences between the Canadian and American civil justice systems identified in chapter 2, we do not think that all of the American problems will be repeated in Canada.[160] The general view in Canada appears to be that class action proceedings have evolved in a more or less balanced fashion.[161] Nevertheless, the potential risks should be considered.

a. Class action laws promote litigation

i. Argument

[126] From the point of view of potential defendants, "the benefits of class action law are only benefits if they assist in dealing with litigation that would have been inevitable."[162] Making it "easier to deal with litigation which the mechanisms of the legislation have created is little consolation."[163] The risk is that some persons who would not choose to sue in the absence of class action legislation will join class actions solely because they happen to be members of a defined class. This is most likely to occur where the claims are small because joining the class action costs little or nothing. In this way, class actions promote litigation unnecessarily. They simply become a means of harassing corporations, government and other defendants.

ii. Response

[127] The alternative to accepting the risk of additional litigation is to fail to compensate persons with legitimate claims. We recognize that it can be uneconomical to pursue relatively modest claims whether or not multiple claims are involved. We are not saying that no consideration should be given to the social

---

[159] See *supra* note 89 and accompanying text.

[160] *Supra* pp. 34-37, paras. [77] to [79].

[161] Meinitzer, *supra* note 68 at 86.

[162] Deborah Glendinning, "The Ontario *Class Proceedings Act*: Key Issues from a Defendant's Perspective," summary of paper presented at Workshop 102, 11th Annual Meeting of the Canadian Corporate Counsel Association (on "Taking the Panic Out of Practice") (Edmonton, August 23-24, 1999) (hereinafter Glendinning) at 5.

[163] *Ibid.*

cost of litigation when designing the litigation system; we are saying that the law should foster just results. Modern class actions do this by making it possible for persons to gain access to justice where they would not otherwise sue because pursuing justice would be uneconomical or because the court system intimidates them. Moreover, although the individual claims may be small, when multiplied by a large number of persons small claims can add up to a large gain for a potential defendant if they are not pursued. Permitting enrichment from wrongdoing is unjust and should be discouraged.

b. Many class actions lack merit

i. Argument

[128] This risk stems from the belief that class actions "magnify and strengthen unmeritorious claims."[164] This happens when class actions are launched as fishing expeditions in order to ascertain whether a cause of action exists. It also happens when a "strike action" is brought.

ii. Response

[129] A facet of this risk involves the assumption that claims that lack merit are easily identified. In the United States, the Rand Institute found, instead, that the merit of claims, in particular class actions, cannot be readily determined. That is because complex stories and ambiguous facts underlie most class actions. Defendants may "sharply contest" their culpability, but because the issues tend to be complex and very few cases go to trial, the merits of the claims being made cannot be properly assessed.[165] While a "significant fraction" of class action cases are dropped before certification in the U.S., empirical data on the reasons why are lacking. It may occur "when the plaintiff counsel concludes that the case cannot be certified or settled for money, when the case is dismissed by the court, or when the claims of representative plaintiffs are settled."[166]

[130] Moreover, protection against this risk rests in the fact that courts have ways of weeding out claims that lack merit. For example, the court may refuse to certify

---

[164] *Ibid.* at 1.

[165] Rand Institute, *supra* note 3 at 16.

[166] *Ibid.* at 5.

the proceeding, strike out the claim where it is frivolous or vexatious or involves an abuse of process, grant summary judgment against the claimant, or award costs.

c. *Class counsel are the main beneficiaries*

i. Argument

[131] This risk is that class actions will benefit persons whom they are not intended to benefit at the expense of the class members; that, motivated by the prospect of their own gain, entrepreneurial lawyers drive the frequency and variety of class actions litigation upwards.[167] The risk, in other words, is that class actions will become simply vehicles for entrepreneurial lawyers to obtain fees. Plaintiff lawyers may launch an action in the hope of obtaining huge fees for relatively little work by reaching a quick settlement. Even though they may have a good defence, defendants may make a business decision to settle rather than defend because of the enormous costs involved in defending a large class action. They choose, in effect, to pay the litigants to go away. The risk of abuse is greatest where contingency fees are high and the risks low. The potential for gain causes class counsel to jockey for control of the litigation as lead counsel. Where government is targeted in this way the settlement amount comes out of tax payers' pockets, an outcome which does not benefit society.

ii. Response

[132] Overall, the Rand Institute studies "tell a more textured tale" of how damage class actions arise and certification is obtained in the U.S. They point out that class action lawyers played "myriad roles";[168] they did not "routinely garner the lion's share of settlements."[169] What was learned was that class counsel were sometimes more interested in reaching a settlement than in protecting the interests of class members by "finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement based on the answers to these questions."[170] However, the facts did bear this much out: in the U.S.,

---

[167] *Ibid.*

[168] *Ibid.* at 19.

[169] *Ibid.* at 18.

[170] *Ibid.*

entrepreneurial plaintiff counsel do sometimes bring actions in the hope of obtaining a windfall fee based on a quick settlement.

[133] In our view, people should not be denied justice because lawyers will be paid for helping them to obtain it. Class counsel play a role that is quite different from the role of counsel in ordinary litigation and they should be remunerated appropriately for assuming and carrying out the additional risks and responsibilities associated with this role. In these circumstances, a large fee is not necessarily an excessive fee. Moreover, Canadian class action regimes add a safeguard to that available in ordinary litigation by requiring court scrutiny and approval of fee agreements in every case. In fact, more room for abuse exists where one lawyer acts for numerous individual litigants in mass non-class actions that may be brought under the existing law than in class action regimes that require court scrutiny and approval of fees. In addition, we think that if lawyers' earnings from litigation are to be reined in, the whole problem should be addressed, not just the problem in class actions.

d. Disproportionately high damages awards

i. Argument

[134] There are two aspects to this risk. The first aspect is that damages awards will be disproportionate to the wrong. For example, a class action brought for a small mistake, say the manufacture of a defective product resulting in individual claims for $10, could bankrupt a company if two million products were sold. One perception coming out of the U.S. is that "the aggregation of claims makes it more likely that a defendant will be found liable and result in a significantly higher damages award."[171] The prospect of a disproportionately high award may "create a stronger than usual incentive to settle, even where the probability of an adverse judgment is low."[172] The second aspect of this risk is that defendants who are only remotely connected to the litigation will become liable for payment of the damages award which is already disproportionate.[173] This will occur through the operation of the doctrine of joint and several liability which leads plaintiffs to sue "deep pocket" defendants.

---

[171] Glendinning, *supra* note 162 at 1.

[172] *Ibid.*

[173] Leon & Walker, *supra* note 106.

ii. Response

[135] As to the first aspect of this risk, in our view, to limit access to justice on the grounds that it will impose costs on wrongdoers is not the appropriate social policy. The measure of the wrong is the loss caused by the wrongful conduct. We do not see a compelling difference between a "minor slip up" that causes a big company to suffer a $100 million loss and a minor slip up that causes 100,000 people each to suffer a $1,000 loss (totalling $100 million). A moment's careless driving or a short-term failure to warn people about contaminated water in order to provide an opportunity to try to fix it may be expensive to the wrongdoer but no one says there should not be a remedy. The fact that a great many people are harmed should not make a difference to their right to obtain a remedy. We also suspect that the size of the damages awards in class actions in the United States may have something to do with punitive damages awarded by juries. Neither punitive damages nor jury awards are common features of civil justice systems in Canada.

[136] As to the second aspect of this risk, the impact of the doctrine of joint and several liability is an issue that should be addressed separately. The procedure followed to gain legal remedies to legal rights is not the proper means through which to alter the legal right.

e. Interests of class members are poorly served

i. Argument

[137] This concern is that class actions do not adequately protect the interests of class members, which in turn means that they do not adequately serve the public interest. The risk stems from the fact that class members typically play a small role in the litigation. If the representative plaintiff is not actively instructing the class counsel, this "clientless" litigation may lead plaintiff lawyers to engage in questionable practices, such as serving their own financial ends rather than the interest of class members.[174]

[138] Beyond this, some plaintiff lawyers object that certification denies people an opportunity to pursue claims individually and leads to settlements that are

---

[174] Rand Institute, *supra* note 3 at 10.

questionably fair to class members.[175] Settlements may be reached when plaintiff lawyers are "motivated by the prospect of substantial fees for relatively little effort" and defendants want to "settle early and inexpensively" in order to avoid the large transaction costs and adverse publicity of continued litigation.[176] Such settlements "may send inappropriate deterrence signals, waste resources, and encourage future frivolous litigation."[177] Also, a proposed settlement may satisfy the interests of the representative plaintiff but pay insufficient attention to the interests of class members.

[139] A further risk is that the compensation awarded will be uneven and, as a consequence, unfair. That is because, in the interests of minimizing transaction costs, compensation is often determined according to a formulaic scheme which may pay insufficient regard to variations in the nature and severity of class members' injuries. The result may be that some individual class members are over-compensated while others are under-compensated.

ii. Response

[140] We agree that precautions need to be taken to ensure that the class actions provisions adequately protect the interests of class members and, through them, the public. We have kept our awareness of this need at the forefront in making our recommendations. The range of protections we recommend includes: a protective role for the court; notification to class members of critical events in the proceedings; attention to class counsel duties to class members; opportunities for class member participation; the possibility of replacing an ineffective representative plaintiff; and compensation as either a percentage of an aggregate award or on the basis of individual factors.

---

[175] Class actions regimes give potential class members the choice of participating in the class action or bringing their own action. However, that choice must be made within a prescribed time. It is possible that a person who misses a mass media notice requiring potential class members to "opt out" within a given time period may be caught in a class action.

[176] Rand Institute, *supra* note 3 at 10.

[177] *Ibid.* at 10.

f. Costs of litigating far outweigh benefits to the class

i. Argument

[141] The argument here is that "damage class actions achieve little in the way of benefits for class members and society while imposing significant costs on defendants, courts and society."[178] An assumption underlying this risk is that the benefits to individual class members are often trivial. A second aspect has to do with the fact that the costs of litigating class actions can be substantial. They include not only fees and expenses for the plaintiff and defence lawyers but also the costs of notice and settlement administration.[179] When this is combined with defendants' increased exposure to damages, some argue that, looked at from a business stance, "certification gives them no recourse but to settle even in the absence of evidence proving liability."[180]

ii. Response

[142] Experience in the U.S. does not bear out the first assumption. In the lawsuits the Rand Institute examined, class members' estimated losses ranged widely. They were generally too modest to support individual action, but nevertheless often numbered in the hundreds or thousands of dollars.[181] As for the second aspect, while it may be true that the costs of litigating class actions can be substantial, surely the question of whether the costs outweigh the benefits to the class is best answered by potential class members when they choose whether to join the class.

g. Class actions invite forum shopping

i. Argument

[143] This risk is that class action lawyers will file lawsuits in certain courts simply because they believe that the law or procedures in a jurisdiction give a strategic advantage, or that a particular judge is most likely to grant certification.[182] The risk is heightened because class actions do not respect geographical boundaries, meaning that often they may be brought legitimately in any one of

---

[178] *Ibid.* at 12.

[179] *Ibid.* at 22.

[180] *Ibid.* at 2.

[181] *Ibid.* at 16.

[182] *Ibid.* at 15.

many jurisdictions – locally, nationally or internationally. What is more, as the Rand Institute points out, "class action lawyers often have greater latitude in their choice of forum or venue than their counterparts in traditional litigation" and this drives transaction costs upwards:[183]

> Under some circumstances, an attorney filing a statewide class action can file in any county of a state and an attorney filing a nationwide class action can file in virtually any state in the country, and perhaps any county in that state as well. In addition, class action attorneys often can file duplicative suits and pursue them simultaneously. These are powerful tools for shaping litigation, providing opportunities not only to seek out favourable law and positively disposed decision makers, but also to maintain (or wrest) control over high-stakes litigation from other class action attorneys.

ii. Response

[144] We agree with the Rand Institute that forum choice provides plaintiff lawyers with an opportunity to jockey for control over the litigation. As in the U.S., it may allow defendants to "seek out plaintiff lawyers who are attractive settlement partners."[184] Furthermore, the interests of class members and the public may not be well-served: "Broad forum choice weakens judicial control over class action litigation."[185] It enables "both plaintiff class action lawyers and defendants to seek better deals for themselves, which may or may not be in the best interests of class members or the public."[186]

[145] A means of minimizing this risk is required. We note that an Ontario judgment sets out some basic ground rules to "cut through the clutter and impose some organization on multiple actions begun by competing counsel in different parts of Ontario."[187] However, the courts are "still wrestling with the problem of imposing control on related class actions begun in different provinces."[188] It is beyond the scope of this project to address the inter-jurisdictional issues. The

---

[183] *Ibid.*

[184] *Ibid.*

[185] *Ibid.*

[186] *Ibid.*

[187] McMillan Binch, *Litigation Bulletin: A Report on Developments in Canadian Litigation* (July 2000). The case is *Vitapharm Canada Ltd.* v. *F. Hoffman-Laroche Ltd.* (2000), 48 O.R. (3d) 21, [2000] O.J. No. 1355 (Ont. Sup. Ct. of Justice).

[188] *Ibid.*

Uniform Law Conference of Canada has already adopted a *Court Jurisdiction and Proceedings Transfer Act*[189] which rationalizes the basis for exercising jurisdiction in ordinary proceedings and also provides a mechanism to transfer cases to the most convenient forum. It would be an appropriate body to examine forum shopping issues in relation to class actions and make recommendations.

h. Harm to the Alberta advantage

i. Argument

[146] The risk articulated here is that the introduction of modern class actions will detract from the Alberta advantage for businesses. That is because businesses want to avoid having to deal with the other risks that come with class actions laws.

ii. Response

[147] We find it difficult to conceive of the possibility that the presence or absence of a class actions regime will have any effect at all on business location decisions.

E. Discussion and Recommendation

[148] As the Rand Institute observed, ultimately, "damage class actions pose a dilemma for public policy because of their capacity to do both good and ill for society."[190] The answers to many of the questions come down to matters of judgment:[191]

> Assessing whether the benefits of Rule 23 damage class actions outweigh their costs ... turns out to be enormously difficult. Whether the corporate behaviours that consumer class actions sought to change were worth changing, whether the dollars that plaintiff class action lawyers sought to obtain for consumer class members were worth recouping, and whether the changes in corporate behaviour that were achieved and the amounts of compensation consumers collected were significant are, to a considerable extent, matters of judgment. Whether the damages claimed by mass tort class members were legitimate, whether defendants should have been held responsible for these damages, and whether plaintiffs were better served by class litigation than they would have been by individual litigation are also matters of judgment.

---

[189] Available at: http://www.law.ualberta.ca/alri. See Uniform Law Conference of Canada at the bottom of the menu on the lefthand side of the screen.

[190] Rand Institute, *supra* note 3 at 25.

[191] *Ibid.* at 23.

The central issue for policy-makers is how to respond to the dilemma over the capacity of class actions to do both "good and ill." We agree with the Rand Institute that focussing on the "sharp differences in political and social values" that create controversy over class actions "squanders opportunities for reforming practices."[192]

[149] Multiple-plaintiff similar-claim litigation is a modern reality. This must be accepted at the outset. The challenge is to ensure that Alberta's civil justice system handles this litigation in a way that allows plaintiffs to bring deserving claims and protects defendants from unreasonable claims using a process that is certain and efficient.

[150] On the basis of our research and consultation on the issues, we have reached the following conclusions:

- procedural reform in this area has widespread support;
- that support anticipates an expansion of class actions; and
- expansion should follow the modern class actions approach that has been adopted in other Canadian provinces

Accordingly, we recommend that Alberta adopt a modern class actions regime. This regime should be based on the regimes that now exist in Quebec, Ontario and British Columbia, have been recommended by the ULCC and are being considered for adoption by the Rules Committee of the Federal Court of Canada.

[151] The goal of uniformity is one reason why we have chosen to recommend reform based on the Canadian legislated class actions model. We have worked from the premise that the recommendations should stay reasonably true to the provisions in the ULCC Act. This is desirable in the interests of securing uniformity of class actions legislation in Canada and discouraging improper forum shopping. One advantage of maintaining uniformity with the class actions laws in

---

[192] *Ibid.* at 25.

other Canadian jurisdictions is that Alberta lawyers and courts will be able to draw on the available jurisprudence for guidance in applying the Alberta provisions.

[152] Adopting a class actions regime would expand the procedural choices available to handle litigation involving multiple plaintiffs with similar claims against the same defendant or defendants. We think it would make a desirable addition to the existing law for cases that fit the specified criteria. However, a legislated class actions regime cannot accommodate all multiple-plaintiff similar-claim cases. For example, cases involving similar claims by multiple plaintiffs against different defendants (unless they formed a defendant class[193]) would have to be dealt with using other procedural mechanisms. Alberta's unified judicial case management model offers an effective procedural approach for those cases that do not meet the requirements of the class actions regime we propose.

[153] Reform may be achieved by statutory enactment or rules change or both in combination. We defer for now making a decision on the method of implementation of a modern class actions regime. This decision can be made after details of the provisions to be included in the class actions regime have been determined. We make detailed recommendations for this model in chapter 4.

RECOMMENDATION No. 2
Alberta should introduce a modern class actions regime. In developing this regime, Alberta should be guided by the Canadian class actions model as exemplified by the ULCC Act.

---

[193] We discuss defendant classes in chapter 4, heading S.

CHAPTER 4. A NEW PROCEDURE FOR CLASS ACTIONS

[154] In this chapter, we ask questions about, and make detailed recommendations for a new procedural regime for class actions in Alberta. For the greater part, this report, including this chapter, concentrates on questions relating to plaintiff class actions. However, later in this chapter (heading R), we also make a recommendation regarding proceedings against a defendant class.

[155] We have appended the ULCC Act to this report in order to provide an example of legislation that provides for a modern Canadian class actions regime. In framing our recommendations for reform, the ULCC Act has served as our prototype. We have two reasons for working from this Act. The first reason is that its contents are representative of the modern Canadian class actions model we have chosen to follow.[194] The second reason is that using this Act as a basis from which to start will facilitate uniformity between our recommendations and the law that has been adopted in other Canadian jurisdictions. As stated at the close of chapter 3, we regard uniformity as a goal worthy of significant weight.

A. Identifying Actions for Which Class Action Procedures are Appropriate

1. Criteria

a. Why the issue arises

[156] In some cases, class action procedures may be required to give claimants access to justice and to handle similar claims efficiently. In other cases, the imposition of class action procedures may be unfair either to claimants or defendants. It is necessary to have some criterion or criteria by which it can be determined whether or not class action procedures are appropriate.

b. Rule 42

[157] Two features characterize a representative action under rule 42. There must be "numerous persons" who have a "common interest in the subject of an intended

---

[194] As stated elsewhere in this report, the ULCC Act, *supra* note 7, is similar to the Ont. and BC Acts, *supra* notes 5 and 6, the ManLRC Report, *supra* note 5 recommendations, and the tentative recommendations of the FedCt DP, *supra* note 5.

action." The number of persons required to be "numerous" is uncertain. The "common interest" must be the "same interest" for all class members.

c. *Class proceedings precedents*

[158] Two requirements of Canadian class proceedings regimes are similar to the rule 42 requirements. First, class proceedings regimes require that there be "an identifiable class of two or more persons" (ULCC Act, s. 4(b)). Naming a small number of persons – two or more – avoids any "numerosity" debate over the number of persons required for a representative action.[195] The members of the class must be "capable of determination in some objective manner" but it "is not necessary for the precise number or identity of the class members to be known" at the outset of the proceeding.[196]

[159] Second, like rule 42, Canadian class proceedings regimes require that "the claims of the class members raise a common issue" (ULCC Act, s. 4(c)). Class proceedings legislation substitutes the words "common issue" for the words "common interest" in the historic representative action rule. However, unlike rule 42, these regimes avoid the debate about whether a "common interest" must be the "same interest" by defining a "common issue" to mean (ULCC Act, s. 1):

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

They avoid debate over the extent, if at all, to which the common issue must predominate over individual issues by adding, after the requirement that the claims of the class members raise a common issue, the words "whether or not those common issues predominate over issues affecting only individual members." The result is that under Canadian class proceedings regimes, the common issues do not have to be determinative of liability.[197] What is required is simply that the resolution of the common issues will advance the proceedings.[198] The requirement

---

[195] It would be rare indeed for a class action consisting of two persons to go forward because a class action is unlikely to be the preferable procedure for the resolution of the common issues: Sullivan, *supra* note 63 at 46.

[196] *Peppiatt* v. *Nicol* (1993), 16 O.R. (3d) 133 at 141 (Gen. Div.).

[197] Harrington (1), *supra* note 24 at 112.

[198] See Eizenga, Peerless & Wright, *supra* note 28 at 3.14-3.15. In Ontario, a "common issue is

(continued...)

that the common issues must predominate over individual issues has been a bone of much contention in the United States.[199]

[160] Canadian class proceedings regimes add a third requirement. It is that a class proceeding must be the "preferable procedure for the resolution of the common issues" (ULCC Act, s. 4(d)). The court makes this determination by taking into consideration the goals of the legislation. The legislation does not spell out the goals; therefore, the court must determine them as a matter of statutory construction. Not surprisingly, the Ontario courts have drawn the goals primarily from the Ontario Law Reform Commission's foundational three-volume 1982 report on class actions.[200] The British Columbia courts have the adopted objectives used by the Ontario courts.[201] The oft-cited objectives, as stated in Ontario, are:[202]

> It seems clear the three main objects of the class proceeding legislation are:

---

[198] (...continued)
sufficient if it is an issue of fact or law common to all claims, and ... its resolution in favour of the plaintiffs will advance the interest of the class, leaving individual issues to be litigated later in separate trials, if necessary": *Endean* v. *Canadian Red Cross Society*, [1997] B.C.J. No. 1209, (1997), 148 D.L.R. (4th) 158 (hereinafter Endean (1)), rev'd on other grounds (1998), 157 D.L.R. (4th) 465 (B.C.C.A.). In BC, it is not necessary that resolution of the common issues produce the same result for all class members: *Chace* v. *Crane*, *supra* note 24.

[199] United States *Federal Rules of Civil Procedure*, 383 U.S. 1029 (1966), r. 23. As discussed in connection with the "preferable procedure" criterion, two jurisdictions reopen (in one case, recommend reopening in the other) the predominance debate by requiring the court to consider predominance, among other matters, when assessing whether or not a class proceeding would be preferable to any other procedural course for the fair and efficient resolution of the common issues.

[200] The Ontario case, Abdool (2), *supra* note 15, enunciated three objectives of the Ontario *Class Proceedings Act*. In his judgment, O'Brien J. cites both the OLRC Report, *supra* note 15, 63, and the Ont Advisory Committee Report, *supra* note 16, on class action reform as useful, but not binding, background to the Act.

[201] In BC, Smith J. in Endean (1), *supra* note 198, adopted the three objectives enunciated by O'Brien J. in Abdool (2), *supra* note 15, and elaborated:

> ...the object of the Act is not to provide perfect justice, but to provide a "fair and efficient resolution" of the common issues. It is a remedial, procedural statute and should be interpreted liberally to give effect to its purpose. It sets out very flexible procedures and clothes the court with broad discretion to ensure that justice is done to all parties.

Blair J. in *McKay* v. *CDI Career Development Institute Ltd.*, [1999] B.C.J. No. 561, adopted the three objectives from *Abdool* and the above quote from *Endean* as the applicable principles of the BC Act. See also statements in: *Campbell* v. *Flexwatt Corp.*, [1996] B.C.J. No. 2052, (1996), 25 B.C.L.R. (3d) 329, 50 C.P.C. (3d) 290, 3 C.P.C. (4th) 208 (supp. Reasons), aff'd in part 15 C.P.C. (4th) 1, 44 B.C.L.R. (3d) 343, additional reasons at 105 B.C.A.C. 158, leave to appeal refused 228 N.R. 197n (S.C.C.) (Hutchison J.) and [1997] B.C.J. No. 2477 (C.A.) (Cumming, Newbury, and Huddart JJ.A.).

[202] Abdool (2), *supra* note 15 at 461.

i) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;

ii) improved access to the courts for those whose actions might not otherwise be asserted. This involved claims which might have merit but legal costs of proceeding were disproportionate to the amount of each claim and hence many plaintiffs would be unable to pursue their legal remedies;

iii) modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligation.

Of these objectives, the most successful argument is that the class proceeding will enhance access to the courts.[203] Courts have also considered the risk of inconsistent findings of liability in separate litigation,[204] the possibility that a class proceeding will put the parties on a more even economic footing[205] and the possible loss of procedural safeguards for the defendant.[206]

[161] The word "preferable" was deliberately chosen over words such as "reasonable" or "superior." The Ontario Attorney General's Advisory Committee on Class Action Reform thought that "preferable" would best draw the court into a consideration of whether or not the class proceeding is preferable to other procedural options as a fair, efficient and manageable method to advance the claims.[207]

[162] British Columbia and the Manitoba Law Reform Commission add a list of five factors that the court must consider in determining "whether a class

---

[203] Sullivan, *supra* note 63 at 53-54, citing *Bendall* v. *McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, 16 C.P.C. (3d) 156, supp. reasons unreported (October 22, 1993), Toronto 14219/93, motion for leave to appeal dismissed [1993] O.J. 4210 (November 26, 1993), Toronto 14219/93 (Gen. Div.), and *Nantais* v. *Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331, 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245 (Gen. Div.), leave to appeal refused 25 O.R. (3d) 331 at 347 (Div. Ct.); but compare *Tiemstra* v. *Insurance Corp. of British Columbia* (1996), 49 C.P.C. (3d) 139, aff'd 12 C.P.C. (4th) 197 (B.C.C.A.), finding that there was no access to justice where a significant portion of the class had taken individual action.

[204] *Nantais* v. *Telectronics Proprietary (Canada) Ltd.*, *ibid.* at 339-40.

[205] *Chace* v. *Crane Canada Ltd.*, *supra* note 24 at para. 22; *Nantais* v. *Telectronics Proprietary (Canada) Ltd.*, *ibid.*

[206] *Sutherland* v. *Canadian Red Cross Society* (1994), 27 O.R. (3d) 645 at 646 (Gen. Div.) at 652; *Abdool* v. *Anaheim Management Ltd.*, *supra* note 15. An example is the loss of a right to examine for discovery. The right to examine for discovery under class proceedings regimes is discussed under heading I of this chapter.

[207] Sullivan, *supra* note 63 at 53, citing the Ont Advisory Committee Report, *supra* note 16.

proceeding would be the preferable procedure for the fair and efficient resolution of the common issues"[208] (ULCC Act, s. 4, note [1]). The factors appear to restrict the circumstances in which the class proceeding would be preferable. The factors are: whether the common issues predominate over individual issues; whether individual members have a valid interest in pursuing separate actions; whether any of the claims are or have been the subject of other proceedings; whether other means of resolving the claims are less practical or efficient; and whether the administration of the class proceeding would create undue difficulty.

[163] The list reopens the predominance debate by requiring the court to consider predominance, among other matters, when assessing whether or not a class proceeding would be preferable to any other procedural course for the fair and efficient resolution of the common issues.[209] However, in this list, the predominance of the common issue is just one factor to be weighed; predominance is not a mandatory requirement.

[164] In addition to predominance, factors that may influence a decision about whether a class proceeding is a preferable proceeding include: the economics of the litigation; the number of individual issues to be dealt with; the complexities if there are third party claims; and the alternative means available for adjudicating the dispute.[210]

---

[208] BC and ManLRC Acts, *supra* notes 6 and 8, s. 4(2). For cases in which the court has considered procedural alternatives, see *Ewing* v. *Francisco Petroleum Enterprises Inc.* (1994), 29 C.P.C. (3d) 212 at 213-14 (Ont. Gen. Div.) and *Chace* v. *Crane Canada Inc.*, *supra* note 24 at para. 65 (test case inadequate).

[209] BC and ManLRC Acts, *ibid*. See *Tiemstra* v. *Insurance Corp. of British Columbia*, *supra* note 203, for a judicial consideration of this provision. Sullivan argues that the Court went off course in this case by "considering the proceeding as a whole and the resolution of individual claims rather than the determination of the common issues."

[210] Eizenga, Peerless & Wright, *supra* note 28 at 3.26-3.32.

d. Creation of subclasses

[165] Canadian class proceedings regimes provide for the creation of subclasses, each having its own representative plaintiff (ULCC Act, s. 6).[211] A subclass can be defined as "a group within a class that has common issues against a defendant that are shared by some but not all of the class members." The characteristics required to form a class must be present to form a subclass. Dividing plaintiffs into subclasses could lead to a more efficient resolution of claims than might be possible otherwise. For example, it could be useful in determining damages where some persons have been injured by a defective product whereas others have suffered worry or inconvenience from being placed at risk. It could also be useful to divide plaintiffs into subclasses for the purpose of assessing liability or damages where plaintiffs have obtained a defective product from different distributors who have made different representations about the product.

e. Consultation and recommendation.

[166] The consultation supported the inclusion of the five criteria required for a class action contained in section 4 of the ULCC Act. Under these criteria, there must be a recognizable cause of action that raises an issue which is common to the members of an identifiable class, the class actions procedure must be the preferable procedure for resolving the common issue and an appropriate representative plaintiff must be available to conduct the action. The consultation also supported the inclusion of the definition of a "common issue" in section 1 of the ULCC Act and the criteria listed in section 6(1) for the creation of subclasses.

[167] One issue arose with regard to the determination of whether a class proceeding would be the preferable procedure. Some respondents expressed the concern that, although the provisions of the ULCC Act are "generally sound . . . there may be insufficient protection for defendants in the factors that the Court must consider in determining whether to certify a class action." They warned of "a real risk that defendants would be practically precluded from advancing certain

---

[211] See e.g., *Peppiatt* v. *Royal Bank of Canada* (1996), 27 O.R. (3d) 462, 44 C.P.C. (3d) 8 (Gen. Div.) (decertification motion). The certification decision is reported at (1993), 16 O.R. (3d) 133. 20 C.P.C. (3d) 272 (Gen. Div.) (certification decision). A motion to amend the statement of claim is reported at (1998), 76 A.C.S.W. (3d) 504 (Ont. Ct. (Gen. Div.)) [098/016/064-10pp.].

legitimate defences by the certification of a class action."[212] They further advised that dealing with the concern by the creation of subclasses would not be an adequate solution because "a subclass for each defence raised by the defendants may have the effect of undermining the efficacy of a matter to proceed as a class action." Our solution to this insufficient protection to defendants would be to require a "fair and efficient resolution of the common issues" in the certification criteria. Rather than introducing the British Columbia and Manitoba factors which might invite a predominance debate of the sort that has been problematic in the United States, our choice would be to modify the ULCC Act by adding the words "fair and efficient" before "resolution" in section 4(d).[213]

[168] Another question that arose on consultation was whether alternative dispute resolution (ADR) mechanisms would have a place in class proceedings. An Ontario case indicates that the Court must consider whether a compensation scheme created by statute, or a dispute resolution procedure that would compensate adequately most of those who might be included in a class action, is preferable to a class action as a method for resolving the common issues.[214] The court in this case accepted defence counsel's argument that the court could consider extra-judicial proposals when determining whether certification was the preferable procedure for resolving a multiparty dispute.[215] We agree that it would be appropriate for the court to consider ADR mechanisms when deciding whether or not a class proceeding would be the preferable procedure for resolving a dispute. The court should also consider the potential impact of the time required to pursue ADR on limitation periods. A class proceeding may be preferable to numerous individual claims filed to guard against the expiration of the limitation

---

[212] No examples were provided. We think it likely that the defences would be particular to certain plaintiffs and thus would not be common issues in any event.

[213] The Freehold Petroleum & Natural Gas Owners Association strongly opposed the inclusion of a "predominance" consideration, as in the BC and ManLRC Acts, *supra* notes 6 and 8 because "any of the common issues which could be raised by freehold royalty owners against a unit operator (failure to protect against drainage of unitized substances, failure to operate in a reasonable and prudent manner, etc.) would give rise to individual issues particular to freehold owners such as the role of their lessees in the alleged breach." The argument also applies to issues such as allegations of improper gas royalty deductions which might be brought under class action legislation by a group of freehold owners against a particular lessee or gas plant operator.

[214] *Brimmer* v. *Via Rail Canada Inc.*, [2000] O.J. No. 1648.

[215] *Ibid.*

period while ADR is in process. Viewing ADR as a competing alternative to a class action is different from using it as an ancillary component of a class proceeding.

[169] With these provisos, we recommend that Alberta adopt the criteria set out in sections 4 and 6(1) of the ULCC Act.

[170] We make further recommendations with respect to the choice of the representative plaintiff and the determination of the class membership under headings C and D below.

RECOMMENDATION No. 3

(1) Five criteria should be satisfied before an action is allowed to proceed as a class action. They are that:
  (a) the pleadings disclose a cause of action,
  (b) there is an identifiable class of two or more persons,
  (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members,
  (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and
  (e) there is a representative plaintiff who
    (i) would fairly and adequately represent the interests of the class,
    (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) "Common issues" should be defined to mean:
  (a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

(3) Subclasses having their own representative plaintiff should be created where the court is satisfied that this is necessary to protect the interests of the members of identifiable subclasses with common issues that are not common to the class as a whole or in fairness to defendants.

2. Non-bars

a. Why the issue arises

[171] The traditional class actions rule has been interpreted restrictively by the courts in many jurisdictions. To ensure that a new regime will serve its intended function by expanding class actions, it may be necessary to spell out circumstances that will not bar a class action.

b. Rule 42

[172] Rule 42 embodies the traditional class actions rule. As in other jurisdictions, it has been interpreted restrictively.

c. Class proceedings precedents

[173] Modern class actions regimes identify five matters that will not bar certification. Each of these matters identifies a current restriction. The five matters are (ULCC Act, s. 7):

> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

d. Consultation and recommendation

[174] The persons consulted were of the view that, although they may be considered in relation to the certification of a class proceeding, the various matters

that limit the scope of class actions under the traditional rule should not be permitted to bar class proceedings under the new regime. We therefore recommend that Alberta specify that none of these five matters shall bar an action from proceeding as a class proceeding.

RECOMMENDATION No. 4

In order to protect actions brought under the new regime from the restrictive interpretation the courts have placed on representative actions under rule 42, Alberta should specify that none of the following five matters bar an action from being conducted as a class action:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

B. Establishing the Presence of the Characteristics

1. Why the issue arises

[175] Before an action can proceed as a class action, a means is needed to determine whether the similar claims satisfy the criteria for a class action.

2. Rule 42

[176] Under rule 42, a representative action is initiated when the plaintiff sues in a representative capacity. If the defendant objects to the use of a representative action, the court decides whether or not it is appropriate to proceed under rule 42. In practice, a plaintiff who is unsure whether rule 42 is the appropriate procedure asks the court for direction.

3. Class proceedings precedents

[177] Canadian class proceedings regimes require court approval before an action can go forward as a class proceeding. This mandatory prior court approval is given in a "certification" order. Certification is the critical step that converts the proceeding from one between the parties named in the pleadings to a class proceeding. This step is critical because it is only upon certification that the class members, rather than just the named parties, become bound by the outcome of the case on the common issues.

[178] Usually, the plaintiff who proposes to represent the class will make the application (ULCC Act, s. 2). However, a defendant may apply where two or more plaintiffs have a common issue against that defendant (ULCC Act, s. 3). Potential advantages of a class action for a defendant include: the consolidation of all claims against the defendant; the ability to deal with one representative plaintiff who has authority to bind the class, whether or not all of its members are specifically identified; the minimization of legal costs; access to statutory case management to expedite the court's handling of the case; and the chance to have common issues involving matters such as the interpretation of statutory language or contractual documents resolved in one case, thereby avoiding inconsistent results.[216]

[179] Mandatory prior court approval ensures adequate protection of the various interests of all class members and guards against potential abuse of process. On the other hand, prior court approval is a departure from the practice under the existing representative action rule. Requiring a plaintiff to apply for certification places an extra burden on the representative plaintiff as well as on the courts. Where a defendant's application leads to the certification of a plaintiff class, the plaintiffs will have been denied the option of pursuing their individual claims in the manner they consider to be most efficient and effective (unless they are given an opportunity to opt out of the class proceeding).[217]

---

[216] Michael G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Aurora, Ontario: Canada Law Book, 1993) at 82.

[217] See heading D of this chapter for a discussion of the determination of class: opting out or opting in?

[180] If the conditions for certification are not satisfied and the court refuses to certify the proceeding (ULCC Act, s. 9) or if the proceeding is later decertified (ULCC Act, s. 10), the court may direct how the proceedings may continue (ULCC Act, s. 9).

4. A word about jurisdiction

[181] Often, the wrong that is the subject of a class proceeding will have occurred in more than one province or to the residents of more than one province, or both. In *Morguard Investments Ltd.* v. *De Savoye*, the Supreme Court of Canada held that the power or authority of a court to hear and decide a dispute involving persons outside of that province is limited by principles of order and fairness.[218] These principles are satisfied only where there is "a real and substantial connection" between the province assuming jurisdiction and the defendant or the subject-matter of the law suit. The Court's decision in *Hunt* v. *T & N plc*[219] elevated the requirement of "a real and substantial connection" to a "constitutional imperative", such that it "has become the absolute constitutional limit on the power of each province to confer judicial jurisdiction on its courts."[220]

[182] If challenged, a plaintiff who seeks to certify a class action will have to convince the court that it has jurisdiction over the dispute. At least two decisions suggest that, in a class proceeding, the fact of a common issue coupled with the policy objective of avoiding a multiplicity of proceedings supports a finding of a "real and substantial connection" where it otherwise might not exist.[221]

---

[218] *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077.

[219] (1994), 109 D.L.R. (4th) 16.

[220] Jean Gabriel Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 54. Even if there is a real and substantial connection, the court may refuse jurisdiction where there is a more convenient or appropriate forum elsewhere: for a detailed discussion, see *Amchem Products Inc. et al* v. *Workers' Compensation Board et al.* (1993), 102 D.L.R. (4th) 96.

[221] In *Harrington* (1), *supra* note 24, the plaintiffs sought to certify a class action in BC seeking damages from a manufacturer and distributors of breast implants. The proposed class was to include "all women who have been implanted ... and are resident in Canada, anywhere other than Ontario and Quebec, or were implanted in Canada, anywhere other than Ontario and Quebec." The defendant did not manufacture the implants in B.C., but implantation of their product did occur there in some cases. The defendant resisted the inclusion of the class of plaintiffs (both B.C. residents and non-residents) who had received implants in provinces other than B.C. on the basis there was no real and substantial connection between those plaintiffs and the B.C. forum. The court concluded that the "demands of

(continued...)

[183] The decision on jurisdiction is important if a court in another province is to recognize a judgment granted in a class proceeding for the purposes of enforcing it against a defendant. It is also important if a court in another province is to recognize a judgment granted in a class proceeding as a bar to an action in that province by a plaintiff who has not actually "opted in" to a class proceeding.[222]

[184] We discuss the choice between "opting in" to a class proceeding or "opting out" of it, and the position of class members who are not resident in the jurisdiction in which the proceeding is brought under heading D.

5. Consultation and recommendations

[185] The main issues to be considered are who should make the determination that an action satisfies the criteria for a class proceeding, and when and how that determination should be made. Should it be, as now, the plaintiff who brings the proceeding by the mere act of filing, subject to court determination if the defendant objects? Alternatively, should a court determination be mandatory and, if mandatory, how should the process be initiated?

[186] The information we received on consultation generally supported the certification requirement and procedure adopted in the Canadian class proceedings regimes. Under these regimes, the mandatory step of "certification" involves

---

[221] (...continued)
multi-claimant manufacturers' liability litigation require recognition of concurrent jurisdiction of courts within Canada" and that "there is no utility in having the same factual issues litigated in several jurisdictions if the claims can be consolidated." Accordingly, the common issue in and of itself provided a "real and substantial" connection, and the class was certified. The decision is under appeal.

In *Nantais* v. *Telectronics Proprietary (Canada) Ltd.*, *supra* note 203, the plaintiffs claimed against the manufacturer of allegedly defective leads for pacemakers. The leads implanted in Canada were made outside Canada, but marketed in Canada through Ontario, by members of the corporate family of defendants. The statement of claim alleged improper design, manufacture, inspection and marketing by the defendants. The defendant opposed the certification of a class which included persons outside of Ontario. The Ontario legislation is silent on the question whether or not a class may contain non-residents. However, the court allowed their inclusion because of the policy reason behind class proceeding legislation to avoid a multiplicity of proceedings. The decision is somewhat confusing in light of the comment that "[a]ny questions of the treatment of non-members of the class ... through some future successful jurisdictional argument, would be dealt with separately."

[222] See *infra* under heading D.3.b. A good discussion of jurisdictional issues in class actions is found in: H. Patrick Glenn, "The Bre-X Affair and Cross-Border Class Actions" 79 Can. Bar Rev. 280. Also see *infra* footnote 223.

obtaining court approval before an action can go forward as a class proceeding. The requirement of court approval protects both class members and defendants.

[187] We will address several issues relating to the certification process. These issues include:

- how is the proceeding commenced?
- who may apply for certification?
- when must the application be made?
- how does the application proceed? can the court adjourn? consider merit?
- what should the certification order say?
- what happens if certification is refused?
- what happens if the criteria for certification later cease to be met?
- what happens where other similar-claim proceedings have been commenced?

a. Commencement

[188] Class actions regimes use the word "proceeding" instead of "action" so as not to restrict the means by which the proceeding may be commenced. Unless otherwise indicated, when we refer to a class action in this report we intend to include proceedings commenced by statement of claim or any other means.

[189] In class proceedings regimes, the proceeding is commenced in the ordinary way. The commencing documentation need not identify the proceeding as a class proceeding. However, where the intention is to seek court permission for the litigation to go forward as a class proceeding, the initiating documentation will show that the proceeding is commenced on behalf of the members of the class and will probably set out the facts necessary to support a certification order.

[190] Ordinarily, the court's jurisdiction over an action will be the basis for bringing the suit, not residency of the plaintiff. For example, that jurisdiction may be based on the presence in the jurisdiction of the defendant or on the occurrence in the jurisdiction of the matter giving rise to the claim (e.g., a mass disaster related to an airplane crash). The doctrine of *forum conveniens* – there is another

forum which is "the most appropriate forum" – will place barriers on forum shopping.[223]

[191] With the exception of Ontario, the precedent class proceeding regimes introduce one restraint. They require the person commencing the proceeding to be a member of a class of persons who are resident in the jurisdiction (ULCC Act, s. 2(1)). That appears to be because the regimes distinguish the way in which non-residents may become class members and require them to form a separate subclass with its own non-resident representative plaintiff. We discuss issues relating to the position of non-resident class members under heading D.

[192] We are not persuaded that the right to commence a class action should be limited to persons resident in Alberta. We think that any person or entity who can otherwise commence an action or application should have this right and recommend that section 2(1) of the ULCC Act be revised accordingly.

b. Application for certification

[193] After a proceeding has been commenced, class proceedings regimes require the plaintiff to apply to the court for an order certifying the proceeding as a class proceeding and appointing the plaintiff as representative plaintiff. This is provided for in section 2(2) of the ULCC Act. Class proceedings regimes also allow a defendant to apply for an order certifying a plaintiff class proceeding (ULCC Act, s. 3).[224] It is at this time that the existence of the criteria necessary for the claim to go ahead as a class proceeding must be made out.

[194] Where the defendant makes application for a class proceeding, selecting the representative plaintiff becomes complicated. It may be questioned whether the ability of a defendant to pursue certification presents an unreasonable burden on a

---

[223] At present, the court has the ability to decline to exercise its authority under the doctrine of *forum conveniens*. However, the court may only decline jurisdiction; there is no mechanism to transfer an action to another forum. The ULCC *Court Jurisdiction and Proceedings Transfer Act* recommends the creation of such a power.

[224] Here, we are talking about a defendant application to form a plaintiff class. We discuss the possibility of allowing the court to certify a defendant class under heading R. *See also* section 39.1 of our draft Act.

plaintiff.[225] In granting a defendant's application, the court may have to take steps to ensure the appointment of a representative plaintiff who will provide fair and adequate representation, present a workable plan to advance the proceeding and not be in any conflict of interest with the members of the class. One measure the court could take would be to adjourn the plaintiff's proceeding until a suitable representative plaintiff is proposed. On balance, we do not consider the burden being placed on the plaintiff to be insurmountable or unreasonable. (The requirements for a suitable representative plaintiff are discussed further under heading C.)

[195] Section 3 of the ULCC Act requires that a defendant who applies for certification of a plaintiff class be a defendant in two or more proceedings. We think this is unnecessary. A defendant should have the ability, upon application, to convert a proceeding into a class proceeding whether or not more than one proceeding has been commenced.[226] We recommend modifying section 3 of the ULCC Act accordingly.

[196] A question is: what would the wording "two or more" require? How would the court deal with the cases that have been commenced? Would the court have discretion to join more than one proceeding, or to make one the class proceeding and stay any others? This question is not unique to a defendant application. The situation of more than one proceeding having been commenced could also occur where more than one plaintiff has commenced a proceeding. In these situations, as recommended under heading J, the court would be able to make use of the rules of civil procedure that are generally applicable. That would include the power under the existing rules of court to join parties, consolidate actions, or order the trial of actions concurrently or sequentially and to stay one action until another has been dealt with.

[197] A further question is: should the plaintiffs be able to "opt out" of a class proceeding that is certified on a defendant's application? We consider this question under heading D.4.g.

---

[225] Docken and Company submission.

[226] McLennan Ross submission.

[198] Subject to the modifications just discussed, the persons consulted found provisions of the ULCC Act attractive. Either the plaintiff or defendant should be able to apply to have a proceeding certified as a class proceeding, and we recommend that Alberta adopt the provisions in sections 2(2) and 3 of the ULCC Act.

c. *Timing of application*

[199] Section 2(3)(a) of the ULCC Act requires the plaintiff to apply for certification within 90 days of the date of delivery of the "last appearance or statement of defence" or the expiry of the time prescribed for this delivery, whichever is later. A defendant may apply at any time.

[200] The language of section 2(3)(a) does not reflect Alberta's civil procedure and terminology. We recommend that it be changed to allow the plaintiff to apply "any time up to 90 days after the date on which the last statement of defence was served."

d. *Application process*

[201] Certification under Canadian class proceedings regimes is essentially a one-step process, although the court has discretion to adjourn the application where the parties need time to amend their materials or pleadings or gather further evidence (ULCC Act, s. 5(1)). In practice, in Ontario, certification regularly proceeds in two stages: first, "to determine the threshold question of whether the proceeding is appropriate for class action;" and, second, "to work out the specific contents of the certification order."[227]

[202] In CM9, we asked whether it would be advantageous to provide a two-step process for certification in order to allow the class members to select the representative plaintiff. We suggested that, in step one, the party seeking approval for a class action would demonstrate that the prerequisite characteristics were present. This would lead to provisional approval. In step two, the potential class members would be notified of the provisional approval and given a chance to participate in a second hearing, giving their views on the desirability of a class

---

[227] Eizenga, Peerless & Wright, *supra* note 28 at 1.6, citing *Bendall* v. *McGhan Medical Corp.*, *supra* note 203

action and on the choice of representative plaintiff if the use of the new procedure is approved.

[203] The opinion expressed on consultation was that a one-step application process would likely be a segmented process in any event (as experience in Ontario demonstrates). As a matter of practice it may be difficult, right at the start, to gather all the information which the court will need to make a certification decision. In Alberta, rule 709 gives the court wide powers to adjourn any sittings either in court or in chambers. Because of our recommendation that the ordinary rules of court apply where the class proceedings provisions are silent (heading J, recommendation 13), it seems unnecessary to include the power to adjourn a certification application. Where circumstances indicate that something needs to be done, the court would have the power to adjourn an application to allow time to do it. However, other Canadian class proceedings regimes include a specific provision on the adjournment of a certification application (ULCC Act, s. 5(1). In the interests of certainty and given our predisposition toward uniformity, the ULCC provision can do no harm and we are content to recommend its inclusion.

e. Court role where criteria satisfied

[204] The opening words of section 4 of the ULCC Act compel the court to certify a class proceeding where the necessary five criteria exist. The wording does not clearly prevent the court from certifying the proceeding if any of the criteria is not made out. We would modify section 4 to make it clear both that the five criteria must be satisfied and that where they are satisfied, the court must grant certification.

f. Certification order

[205] Section 8 of the ULCC Act specifies the contents of a certification order. We note that section 8(1)(g) anticipates the recommendation we make under heading D that non-residents should be required to opt in to the class proceeding.

[206] British Columbia adds subsection (4) to section 8. It says:

> Without limiting the generality of subsection (3), where it appears to the court that a representative plaintiff is not acting in the best interests of the class, the court may substitute another class member or any other person as the representative plaintiff.

We think this addition is a good idea, but would alter the wording to correspond to section 4(e)(i). Subject to this addition, we are in general agreement with the provisions of ULCC Act section 8.

[207] In addition, ULCC Act section 5(2) specifies that a certification order is not a determination of the merits. This provision appears to have been included in order to avoid litigation in Canada of the sort that has occurred in the United States on this point. Because it seems to state the obvious, it may not be necessary at all. Once again, however, in the interests of maintaining uniformity and for greater certainty, we recommend that it be included.

g. Refusal to certify

[208] Section 9 of the ULCC Act gives the court power to direct what should happen if the proceeding is not certified as a class proceeding. Refusal would occur where the criteria necessary for certification are not satisfied. Where certification is refused, the court may permit the proceeding to continue as one or more proceedings between different parties, and in so doing, may:

(a) order the addition, deletion or substitution of parties,
(b) order the amendment of the pleadings, and
(c) make any other order that it considers appropriate.

An example of "any other order" could be an order to notify potential class members of the refusal to certify. We would adopt this provision.

h. Amendment of certification order or decertification

[209] Section 10(1) of the ULCC Act permits the court to amend a certification order, or to decertify the proceeding, depending on the circumstances. Where the proceeding is decertified, subsection (2) enables the court to order a "graceful exit" from the class proceeding by making any of the orders referred to in section 9(a) to (c). We agree that these powers should be included in the class proceedings provisions. However, we would redraft the ULCC Act section in order to clarify the circumstances that call for the exercise of one or the other of these powers.

i. Certification of a settlement class

[210] In jurisdictions having a class proceedings regime, a practice has developed of seeking certification for the purpose of binding all class members to a pre-

negotiated settlement. Usually, the defendant makes certification a condition of the settlement.

[211] It is generally accepted that the creation of settlement classes should be encouraged. However, in order to protect the interests of the class members, we think it important to ensure that the settlement is subject to court approval just as it would be if it had been reached after certification of the class proceeding. In fact, the court's task may be more difficult where the settlement agreement has been reached prior to certification because the court is likely to have less information before it about the claims to help it protect the interests of the class members.

[212] In order to clarify the connection between certification of a settlement class and the need for court approval of the settlement, we would add section 8.1 to the ULCC Act to carry out our recommendation no. 5(8). We would also define "settlement class" in section 1.

RECOMMENDATION No. 5

(1) Any person or entity who can otherwise commence an action or application should be able to commence a class action. That person should be required to seek certification (permission to take the action forward as a class action) and appointment as representative plaintiff within 90 days after the last statement of defence was served or at any other time with leave of the court

(2) A defendant should be able to apply for certification of a class of plaintiffs and appointment of a representative plaintiff.

(3) The court should be able to certify a person who is not a member of the class as the representative plaintiff where it is necessary to do so in order to avoid a substantial injustice to the class.

(4) The court should have power to adjourn an application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(5) A class that comprises persons resident in Alberta and persons not resident in Alberta should be divided into resident and non-resident subclasses.

(6) A certification or subclass certification order should:

(a) describe the class in respect of which the order was made by setting out the class's identifying characteristics,
(b) appoint the representative plaintiff for the class,
(c) state the nature of the claims asserted on behalf of the class,
(d) state the relief sought by the class,
(e) set out the common issues for the class,
(f) state the manner in which and the time within which a class member who is a resident of Alberta may opt out of the proceeding,
(g) state the manner in which, and the time within which, a potential class member who is not a resident of Alberta may opt in to the proceeding, and
(h) include any other provisions the court considers appropriate.

(7) The court should be able to amend a certification order on the application of a party or class member or on its own motion.

(8) Where certification is sought for the purpose of binding the members of a settlement class, court approval of the settlement should be required as it would if the action were to proceed.

(9) (a) The court should be able to decline to certify the litigation as a class proceeding or, on the application of a party or class member or on its own motion, decertify it if it is demonstrated that the criteria for certification are not met.
(b) Where the court refuses to certify or makes a decertification order, the court should be able to permit the proceeding to continue as one or more proceedings and make appropriate directions.

C. Selecting the Representative Plaintiff

1. Why the issue arises

[213] The selection of the representative plaintiff is important because the representative plaintiff conducts the litigation on the common issue or issues, making all decisions and giving all directions which are necessary for that purpose,

and for that purpose represents the rights, interests and obligations of all class members.

2. Rule 42

[214] Under rule 42, the plaintiff who brings the representative action is self-selected. No particular requirements are set out in the rule.

3. Class actions precedents

[215] Before certifying an action as a class action, Canadian class proceedings regimes require the court to be satisfied that there is a representative plaintiff who (ULCC Act, s. 4(e)):

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

Parallel criteria govern the appointment of the representative plaintiff for a subclass (ULCC Act, s. 6(1)).

[216] ***Fair and adequate representation***. The representative plaintiff's situation does not have to be typical of the situations of the class members.[228] Where differences in the situations of the class member are significant, subclasses could be formed with their own representative plaintiffs.[229] Other factors courts have looked at to determine whether a representative plaintiff is appropriate include: selection by other class members; retention of experienced counsel; and willingness to proceed with the action.[230]

---

[228] Abdool (2), *supra* note 15 at 465; see also ***Nantais*** v. ***Telectronics Proprietary (Canada) Ltd.***, *supra* note 203, and ***Harrington*** v. ***Dow Corning Corp.***, *supra* note 24. Compare ***Sutherland*** v. ***Canadian Red Cross Society***, *supra* note 206.

[229] ***Campbell*** v. ***Flexwatt Corp.***, *supra* note 201; see also ***Peppiatt*** v. ***Royal Bank of Canada***, *supra* note 211.

[230] ***Peppiatt*** v. ***Nicol***, *supra* note 196 at 141.

[217] ***Workable plan***. The representative plaintiff must produce a plan for the class proceeding that "sets out a workable method of advancing the proceeding on behalf of the class and of notifying the class members" (ULCC Act, s. 4(e)(ii)).[231] It should set out the procedure proposed for the resolution of individual issues that remain after the resolution of the common issues. Courts understand that a plan produced at this early stage is likely to be sketchy and they approach it flexibly, accepting that changes are likely to be needed as the action progresses.[232]

[218] ***No conflict of interest***. This condition applies only with respect to the common issue. The fact that the proposed representative plaintiff has an interest that is somewhat different from that of other class members does not prevent that person from being appropriate.[233] Several provisions protect class members against the risks that might arise from the certification of an inappropriate representative plaintiff. These include class members receiving notification of the certification, being able to opt out of the proceeding, and having the opportunity to intervene. Another protection is that the court must approve any settlement, discontinuance or abandonment.[234]

[219] Procedurally, the representative plaintiff is self-proposed. That is because usually other claimants (class members) are not yet involved in the proceeding. It falls to the defendant to point out the plaintiff's inadequacies to represent the class. The defendant may know little about the plaintiff other than what the plaintiff says in the affidavit supporting the application for certification and what the defendant has learned from cross-examination on that affidavit.[235] What is more, the defendant is in a conflict of interest when it comes to speaking for the class members' interests.

---

[231] The "plan should also have within it a breakdown of the stages of the proceeding and a time frame for the completion of each stage": Sullivan, *supra* note 63 at 61, citing *Campbell* v. *Flexwatt Corp.*, *supra* note 201 at para. 26.

[232] Harrington (1), *supra* note 24 at 114; *Peppiatt* v. *Nicol*, *supra* note 196 at 141.

[233] *Ewing* v. *Francisco Petroleum Enterprises Inc.* (1994), 29 C.P.C. (3d) 212 (Ont. Gen. Div.); *Chace* v. *Crane Canada Inc.*, *supra* note 24.

[234] Sullivan, *supra* note 63 at 61, referring to ss. 15, 16, 19 and 35 of the BC Act, *supra* note 6, which are essentially the same as ss. 15, 16, 19 and 35 of the ULCC Act, *supra* note 7.

[235] Sullivan, *ibid*. at 29-32.

[220] As previously discussed, the selection of a representative plaintiff may be more difficult where the defendant applies because no individual plaintiff may be willing to assume the burden of responsibilities that a representative plaintiff carries.[236]

[221] One question is: must the representative plaintiff be a member of the class? Canadian class proceedings regimes allow the court to approve a person who is not a member of the class as the representative plaintiff, but "only if it is necessary to do so in order to avoid a substantial injustice to the class" (ULCC Act, s. 2(4)). The exception could be useful in cases where a particular individual or organization possesses special ability, experience or resources that would enable it to conduct the case on behalf of all class members.[237]

4. Consultation and recommendations

[222] In CM9, we asked whether the representative plaintiff should be self-selected, chosen by the class members, or determined by the court on the application of a party or class member.

[223] We have already established our view that the representative plaintiff should be approved by the court. Class proceedings regimes require the plaintiff to apply to be appointed representative plaintiff (ULCC Act, s. 2(2)). They also permit a defendant to apply for the certification of a proceeding as a class proceeding and the appointment of a representative plaintiff (ULCC Act, s. 3), in which case a representative plaintiff will have to be found. As already noted, this may be difficult, but the court may use its power to adjourn the proceeding until a suitable representative plaintiff is proposed.

[224] We also asked what qualities a representative should have. The consultation showed support for the ULCC provisions: fair and adequate representation; a workable plan for the lawsuit; and no conflict of interest. These provisions dwell on the ability of the representative plaintiff to make adequate representation from the point of view of the class members. Looked at from the vantage point of

---

[236] *Ibid.* at 16.

[237] Ruth Rogers, *A Uniform Class Actions Statute*, 1995 Proceedings of the Uniform Law Conference of Canada, Appendix O, Part 3, heading 1(d) (hereinafter ULCC DP).

defendants, the court may also want to consider the ability of the proposed representative plaintiff to be discovered on matters having to do with the class.

[225] On consultation, views varied in response to the question whether the representative plaintiff must be a class member. Some respondents clearly felt that non-class members should be allowed to represent the class and that section 2(4) of the ULCC Act is too restrictive and should be relaxed. They argue that in some situations, a non-profit society or other organization may be in a better position to represent the class than an individual member. Other respondents advocated caution, observing that discovery by the defendant could be hampered if the representative plaintiff doesn't have a personal claim. On balance, we recommend the adoption of the ULCC provision, making sure that "person" includes a non-profit society or other organization.

[226] Another question is whether a non-resident plaintiff should be able to represent the entire class. As already stated (heading B.5.a), residency or non-residency is not a factor affecting the right of a plaintiff to bring an ordinary action and we don't think it should be a factor in a class action. That in itself does not resolve questions about the selection of a suitable representative plaintiff. Even though the person who commences the action usually will become the representative plaintiff, this does not happen automatically. It may be questioned whether a non-resident representative plaintiff would be in a position to adequately inform themself about matters relating to the whole class to be able to give adequate discovery.

[227] Earlier (heading B.5.a), we accepted the ULCC position that non-resident class members should form a separate subclass with their own representative plaintiff. We imagined that although non-resident subclass members must have an issue in common with the whole class, their position might differ in significant ways.[238] That distinction notwithstanding, we can think of no good reason why the representative plaintiff need be resident in Alberta. Furthermore, although the representative plaintiff of a non-resident subclass likely will be a non-resident of Alberta in many cases, we see no need to restrict the appointment of such a

---

[238] In the next section (heading D), we discuss whether membership in the class should be determined using an opt out or opt in approach. In that context, we accept the distinction the ULCC Act, *supra* note 7, makes between resident and non-resident class members for constitutional reasons.

representative plaintiff to a non-resident. The criteria set out in ULCC Act section 4(e) and 6(1), respectively, provide a sound basis for the selection of the representative plaintiff of the main class or any subclass and should be followed.

RECOMMENDATION No. 6

(1) The representative plaintiff of a class or subclass should be a person who:

- **(a) would fairly and adequately represent the interests of the class or subclass,**
- **(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class or subclass and of notifying class or subclass members of the proceeding, and**
- **(c) does not have, on the common issues for the class or subclass, an interest that is in conflict with the interests of other class or subclass members.**

(2) Where it appears to the court that a representative plaintiff is not fairly and adequately representing the interests of the class or subclass, the court should be able to substitute another class or subclass member or any other person as the representative plaintiff.

D. Determining the Class: Opting Out or Opting In?

1. Why the issues arise

[228] The interests of members of the class will be affected by the conduct and outcome of a class action. An important question is how membership in the class will be determined. Should potential class members automatically be included in the class but be given an opportunity to opt out of the proceeding, or should they be required to take a positive step in order to be included in the proceeding? (So that each potential class member will have an opportunity to decide one way or the other, justice requires that they be notified of the existence of the proceeding: see discussion of notice under heading F.)

2. Rule 42

[229] Rule 42 does not specify how individual membership in a class is to be determined.

3. Class proceedings precedents

[230] Class proceeding precedents raise the issue of whether class members should be required to "opt in" to the class proceeding or have the right to "opt out" of it.

a. *Resident class members: opting out*

[231] The choice made in Canadian class proceedings regimes for resident class members is that the class member is included in the class action but may opt out of it (ULCC Act, ss. 16 and 19(6)(b)). "Opting out" requires a class member to take an affirmative step in order to avoid being bound by the outcome of the class action. Otherwise, the claimant will automatically be included in the group. An opt out regime tends to produce a larger class than an opt in regime and therefore tends to be preferred by those with plaintiff interests. Ontario, British Columbia, the ULCC Act, the Federal Court Rules Committee's tentative recommendation and U.S. Federal Rule 23 use the opt out requirement; the Manitoba Law Reform Commission also recommends it.

b. *Non-resident class members: opting in*

[232] As previously stated, at times the wrong that is the subject of a class proceeding will have occurred in more than one province or to the residents of more than one province, or both. British Columbia and the ULCC and ManLRC recommendations require non-residents to take the affirmative step of "opting in" to the class proceeding.[239] That is to say, a person must take some prescribed step within a prescribed period before they become a member of the group and bound by the result of the litigation. An opt in regime tends to produce a smaller class and is therefore preferred by those with defendant interests. From a jurisdictional perspective, "opting in" has the advantage of indicating that the non-resident accepts the jurisdiction of the court such that they would be precluded by the doctrine of *res judicata* from later suing or benefiting from a suit brought in another jurisdiction.

---

[239] The Scottish Law Commission made "opting in" their general recommendation. They took the position that the primary consideration should be the preservation of liberty of the individual to participate in litigation only if he or she wishes to do so and thus advocated for an opt in requirement: SLC Report, *supra* note 18 at paras. [4.47] to [4.57], recs. 13 and 14.

[233] The Ontario class proceedings legislation does not mention residency. Courts in that province have developed the concept of a "national" class and, in assuming jurisdiction on this basis, purported to bind both resident and non-resident class members who have been given reasonable notice of the class proceeding and have not opted out. The problem of the status of a person who is deemed to be a class member but who has not submitted to the jurisdiction is unique to class proceedings. That is because, in ordinary litigation, the plaintiff normally will have chosen the forum in which they have sued and so cannot later challenge the jurisdiction of that forum. What would happen if a non-resident class member chose to take action or join a class in a proceeding brought against the same defendant with respect to the same subject matter in another province? Could that person successfully argue that the original court lacked jurisdiction over them? In *Nantais* v. *Telectronics Proprietary (Canada) Ltd.*, the Ontario court found the approach taken in the United States persuasive.[240] Courts in the United States concentrate not on jurisdiction but on whether the plaintiffs were afforded due process. Once a potential class member is given reasonable notice and the opportunity to opt out, a judgment is binding on that individual. Failure to opt out is treated as implied consent to be bound by the class judgment for jurisdictional purposes.[241]

c. A third option

[234] The questions we asked in CM9 suggest that the choice between an "opt out" regime and an "opt in" regime must be made in the provisions themselves. A third option would be to give the court discretion to decide whether class members should be required to opt into or out of the proceeding. This discretion could be exercised when certification takes place or thereafter as more information about the potential composition of the class becomes available. Lord Woolf made this recommendation in his report on *Access to Justice* in England, as did the South Africa Law Reform Commission in its report.

---

[240] *Nantais* v. *Telectronics Proprietary (Canada) Ltd.*, *supra* note 203. In dismissing the appeal on jurisdiction, Zuber J. commented, "Whether the result reached in an Ontario court in a class proceeding will bind members of the class in other provinces who remained passive and simply did not opt out, remains to be seen. The law of *res judicata* may have to adapt itself to the class proceeding concept."

[241] See e.g., *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985) U.S.S.C.

4. Consultation and recommendations

a. General position

[235] In CM9 we asked how membership in the class should be determined. Taking our cue from the provisions in Canadian class actions regimes, we asked whether a potential class member should be included in the class unless they take the active step of opting out of the proceeding or excluded from the class unless they take the active step of opting in.

[236] The issue of the manner in which potential class members become actual class members was one of the most contentious issues we faced. Together with certification, it was regarded as key to the operation of a class proceedings regime. It produced intense, protracted and essentially unresolved debate.

b. Arguments for and against opting out

[237] General advantages of "opting out" include:

- opting out enhances access to justice;
- barriers to justice are reduced for socially vulnerable class members because they are automatically included: that is, it enhances access to legal remedies to those who are disadvantaged either socially, intellectually or psychologically, and who would be unable for one reason or another to take the positive step of including themselves in the proceedings;
- the interests of class members are protected by other procedural requirements;
- opting out provides certainty for defendants in that they can know more precisely than in an "opt in" regime, how many class members they may face in subsequent individual proceedings;
- it serves the deterrence objective of tort law: the ends of justice demand that certain defendants be assessed the full measure of the damages they have caused rather than escaping that consequence simply because a number of members of the plaintiff class, for various reasons, do not take the steps necessary to opt in to a class action;
- class members retain their liberty to opt out for whatever reason;
- persons who opt out can still bring their own action;
- costs are reduced and efficiency increased for all concerned; and

- opting out ensures a single decision on all the issues on which the class members have the same interest.

[238] Disadvantages of opting out include:

- a class member who fails to opt out in time is bound by the result whether or not they want to be;
- the action may draw in claimants who do not want to sue, or who would not bother;
- it is objectionable that someone can pursue an action on behalf of others without an express mandate;
- class members may learn about the litigation too late to opt out; and
- "opting out" violates the liberty of the individual to choose whether to bring an action.

c. *Arguments for and against opting in*

[239] General advantages of "opting in" include:

- a class member will be bound by the result only if they intend to be;
- all class members who stand to benefit will have shown some minimal interest in the litigation;
- nominal (*de minimus*) claims will not as likely to be pursued;
- the outcome will not bind individuals who have no knowledge of the lawsuit;
- silence will not be taken as a desire to remain in the class;
- class members usually must take a step to recover – with an opt in regime, this step occurs at the outset;
- requiring class members to take an active step helps to discourage entrepreneurial plaintiff lawyers from bringing strike actions;
- opting in prevents corporations from becoming insurers of every loss;
- opting in is consistent with ordinary procedures for commencing a legal proceeding; and
- persons who do not opt in can bring their own action.

[240] Disadvantages of "opting in" include:

- potential class members who would choose to opt in may not know of the proceeding
- an "opt in" requirement may deny access to justice to potential class members who fail to opt in because of economic, psychological and social barriers;
- if the class action is only available to people who choose to sue together very much of its purpose is lost, it becomes little more than a permissive joinder device; and
- multiple proceedings could cost more for corporate defendants.

d. Arguments for and against judicial choice

[241] General advantages of judicial choice include:

- judicial choice allows the court to decide whether "opting out" or "opting in" "is most appropriate to the particular circumstances" and which of these choices "contributes best to the overall disposition of the case;"[242]
- it allows "opt in" to be
    - chosen as "the preferred approach where there is a well-defined or identifiable group of claimants;"[243]
    - the choice where the potential class member is likely to have full information about their rights;
- it allows "opt out" to be the choice where potential class members are unlikely to know their rights or be capable of exercising them;
- it allows the court to take into account the size of individual damage claims; and
- judicial choice could permit flexibility within a proceeding, e.g., a proceeding might commence on an "opt out" basis and later be converted to an "opt in" proceeding as more facts become known, the class becomes more closely defined and the criteria for membership in the class are better established.

---

[242] Lord Woolf Report, *supra* note 12, c. 17, para. 45.

[243] *Ibid.*, c. 17, para. 43.

[242] Disadvantages of judicial choice include:

- judicial choice places the parties in a position of uncertainty because they do not know in advance which procedure will be followed; and
- it invites litigation over the procedural choice.

e. Principal recommendation

We agree with the Ontario Law Reform Commission which concluded that an opt in requirement would be fundamentally inconsistent with the access to justice rationale endorsed as a basic justification for expanded class proceedings legislation. That is to say, making justice available is the predominant policy concern and inclusiveness in the class should be promoted. People who are vulnerable should be swept in. As well, an "opt out" system is the normal choice in Canada. We view harmony with the law in other Canadian jurisdictions and the discouragement of forum shopping as important. These ends also support our decision to recommend that Alberta adopt an "opt out" regime for resident class members.

f. Non-residents

[243] In CM9 we also asked whether resident and non-resident class members should be treated differently. The responses on consultation went both ways. One group of respondents preferred the principle that members of the plaintiff class are bound by proceedings unless they opt out, rather than provisions like the British Columbia Act, which require non-resident members of the plaintiff class to specifically opt in. As a matter of reality, in most class actions the vast majority of the members of the plaintiff class are not active participants in the litigation. Therefore, to force them to specifically opt in would likely have the effect of immediately reducing damages that may perhaps otherwise be payable. In addition, it would encourage parallel litigation in other provinces and this should be discouraged.

[244] On the other hand, as Branch concludes, "An opt-in class giving non-resident class members the power to make their own decisions as to whether to be bound by an Ontario action would be more constitutionally sound, would be more

equitable to non-resident class members, and would provide more certainty to defendants as to the final effect of the class action judgement."[244]

[245] For constitutional reasons, we support the idea that non-residents should be required to opt in to the proceedings. We note, however, that if one of our goals were to be to put Alberta into a position to compete effectively with Ontario as a forum for national class litigation, the provision would have to require all Canadians to opt out.

g. Clarification of status

[246] In CM9, we also asked whether a potential class member should be entitled to confirm their status as a class member or non-class member. We explained that potential class members may not know from the definition of the class whether or not they are included in, and therefore bound by, the outcome of the litigation. We suggested that it would be helpful to provide potential class members with a procedure that allows them to confirm their status as class members or non-class members. Such provision would give a person who is in doubt a firm basis from which to make their own litigation decisions.

[247] On consultation, the point was made that certification notices are likely to provide an individual office to contact for further information which would assist potential class members in ascertaining whether or not they are included within the class. We agree that accommodation of this kind would be helpful. Nevertheless, we think potential class members who are in doubt should be able to obtain formal verification of their status. If they are not class members, they may want to bring individual action and must do so before the expiry of any limitation period running against them. We recommend that the provisions should give potential class members a way to clarify whether or not they are members of the class.

h. Defendant application for a plaintiff class

[248] Later in this chapter (heading R), we recommend that where the court certifies a defendant class, the members of that class should not have the right to opt out. That is because by opting out the defendant class members could defeat the purpose of the court order. However, a defendant class member would have the

---

[244] Branch, *supra* note 77 at para. 11.120.

right to apply to be added as a named defendant for the purpose of conducting their own defence. Likewise, where the court certifies a plaintiff class on a defendant's application, plaintiff class members could defeat the purpose of the court order by opting out. If plaintiff class members are allowed to opt out in this situation, a wily defendant might turn the tables by starting a separate action (or counterclaim) for a declaration of right and naming the original plaintiff as the proposed representative defendant (or defendant by counterclaim). We therefore recommend that where the court certifies a plaintiff class on a defendant's application, the plaintiff class members should be prohibited from opting out unless the court grants them leave to do so. In this situation, we would give a plaintiff class member the right to apply to be added as a named plaintiff for the purpose of conducting their own case.

RECOMMENDATION No. 7

(1) Class members resident in Alberta who do not want to be bound by the outcome of a class action brought by a plaintiff on their behalf should be given an opportunity to opt out of the proceedings

(2) Where the court certifies a plaintiff class on a defendant's application, members of the class should not be able to opt out except with leave of the court. However, special provision should be made giving any member of the plaintiff class the right to apply to be added as a named plaintiff for the purpose of conducting their own case.

(3) Potential class members who are not resident in Alberta but who wish to join the class action should be required to opt in to the proceedings.

(4) The court should have power to determine whether or not a person is a member of a class or subclass.

E. Right of Class Members to Participate in the Conduct of the Class Action

1. Why the issue arises

[249] A class action is likely to affect the legal rights of class members. While efficiency requires that a class action be conducted by a representative plaintiff or plaintiffs, there remains a question as to whether or not other members of the class should be able to participate in the making of decisions. (Note that this issue is not

directed to the question whether class members can be compelled to participate, e.g., by being subject to examination for discovery.[245])

2. Rule 42

[250] Rule 42 is silent with respect to the participation of class members in the conduct of the litigation.

3. Class proceedings precedents

[251] Under Canadian class proceedings regimes, the court has discretion, at any time, to "permit one or more class members to participate in the proceeding if this would be useful to the class" (ULCC Act, s. 15). In addition to opportunities to participate at different points in the procedure, provisions on notice and court supervision help to protect the interests of class members.

4. Consultation and recommendation

[252] In CM9, we asked in what circumstances, if any, class members should be allowed to participate in the conduct of a class action. The general view on consultation was that class member participation should not detract unduly from the procedural simplification and other benefits which the new procedure is designed to provide. The ULCC provisions give the court discretion to hear class members if class member participation would be "useful to the class" (ULCC Act, s. 15(1)) and this was thought to be sufficient. One respondent thought it unlikely that members of a class would be interested in participating other than at the conclusion when there are settlement funds or judgment awards to be distributed.

[253] We agree with the advice received on consultation. At the same time, we have kept in mind the conclusion of the Rand study that class members in the United States need better protection and should play a larger role in class actions. We think that class member participation can be adequately facilitated through mechanisms such as notification to class members of critical events in the proceedings; case management conducted in awareness of the interests of class members; and the use of class members' committees to advise the representative plaintiff and class counsel on issues that arise as the litigation progresses.

---

[245] Discovery is discussed under heading I.

RECOMMENDATION No. 8
The court should have power to determine whether or not, when and how class members may participate in the proceeding if this would be useful to the class or subclass.

F. Notice

1. Why the issue arises

[254] The question of notice arises because the rights of the members of the class are affected by the class action and it is at least arguable that all members should have notice, not only of the commencement of the class action but also of at least some important events in the class action, so that they may take steps to protect their interests.

2. Rule 42

[255] Rule 42 does not make specific provision with respect to notice to class members.

[256] Under the Alberta Rules, notice is ordinarily required to be served only on parties. Rule 23 gives the court discretion to direct substituted service or to dispense with service where prompt personal service is impractical. Rule 387.1 allows the court to dispense with service of notice to some parties in a multi-party action. One exception is rule 408: on an originating notice, rule 408 allows the court to give directions as to the persons to be served "whether those persons are or are not parties."

3. Class proceedings precedents

[257] Canadian class proceedings regimes require notice to be given to class members in three circumstances. First, the representative plaintiff must notify class members that the action has been certified as a class action (ULCC Act, s. 19). The notice must contain information on a variety of matters. It is the notice by which class members learn of the class action and its impact on their rights. This notice is of fundamental importance because it informs class members of their right to decide whether or not to be included in the class and, consequently, bound by the outcome of the proceedings. Second, where the court determines the common issues in favour of the class members and individual members are required to participate in the determination of individual issues, the representative plaintiff

must notify those class members of this fact (ULCC Act, s. 20). Third, the court may order any party to give notice where "necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding" (ULCC Act, s. 21). Relative to the third situation, the court is required to consider whether notice should be given where the court dismisses a class action or approves a settlement, discontinuance or abandonment (ULCC Act, s. 35(5)). In all of these instances, the court must approve the notice before it is given (ULCC Act, s. 22). The court also has discretion to order one party to give the notice required of another party (ULCC Act, s. 23) and to order costs, including the apportionment of costs among parties (ULCC Act, s. 24).

[258] The court has discretion to order that notice be given by any "means or combination of means that the court considers appropriate" (ULCC Act, s. 19(4)). The means specified include: personal delivery; mail; posting, advertising, publishing or leafleting; and individually notifying a sample group within the class.

4. Consultation and recommendations

[259] In CM9, we asked what, if any, changes should be made to the existing notice provisions to accommodate class actions. The persons consulted recognized the need to include notice provisions that go further than the notice provisions that govern ordinary actions. They voiced general support for the ULCC provisions. That is to say, the representative plaintiff should have an obligation to attempt to provide effective notice to all of the persons that the representative plaintiff purports to represent.

[260] Just how this notice should be given is a matter that can be left to the discretion of the court, making use of any of a number of mechanisms or combinations of mechanisms, as appropriate to the circumstances of the particular case. To the methods listed in section 19(4) of the ULCC Act, the ManLRC would add "creating or maintaining an Internet site." We agree with this addition.

[261] ***Notice of certification.*** After certification has been granted, defendants are likely to want the broadest possible class notice to be given so that they will not have to deal with subsequent individual claims. As well, potential class members who are resident in the jurisdiction should be made aware that if they do not opt

out of the proceeding, they will be bound by its result whether that result is reached by judgment or settlement. We recommend changes to ULCC Act, s. 19(5) (g) and (h) that will make this clear.

[262] ***Notice of certification of a settlement class.*** Where the application for certification was made on behalf of a "settlement class", the notice should include the terms of the settlement. We so recommend. The term "settlement class" describes a situation in which a plaintiff has reached a settlement with a defendant prior to certification and certification is being sought as a condition of settlement in order to bind the class members to it.

[263] ***Notice of determination of common issues.*** Some respondents observed that class members may be required to take specific steps in order to obtain relief after the common issues have been determined. This being so, they argued that class members might just as well be required to identify themselves at the outset by opting in to the proceeding in the first place. On the other hand, the point was made that not every common issues resolution will require class members to take steps. For example, if the issue is over-billing for a regularly provided service, the defendant can correct the error by crediting class members on a subsequent billing and the class members in an "opt out" regime will not need to do anything at all. We previously recommended the adoption of an opt out regime for class members who are resident in the jurisdiction in which the proceeding is brought.

[264] ***Notice of settlement.*** Some respondents favoured mandatory notice prior to court approval of a settlement sought after certification. They felt that this would be a laudable safeguard, helping to ensure that a settlement is fair to class members. This position is attractive. Adopting it would protect class members by giving them a chance to participate in the hearing on the settlement terms. However, notice can be expensive. Although notice will usually be appropriate where the class is relatively small, class members have been individually identified and the damage claims are substantial, it is less likely to be appropriate where the class is large, class members have not been individually identified and the individual recovery being sought is nominal. On balance, we think that the approach in section 35 of the ULCC Act is preferable. Section 35 requires the court to consider whether notice of settlement should be given before court approval is granted.

[265] ***Notice to protect interests of affected persons.*** We agree with the inclusion of section 21 of the ULCC Act which permits the court to order any party to give notice to persons in order to protect the interests of any class members or to ensure the fair conduct of the proceeding.

[266] ***Court approval of notice.*** As is required by section 22 of the ULCC Act, we think that the court should approve any of the notices specified before they are given.

[267] ***Giving notice by another party.*** We endorse section 23 of the ULCC Act which permits the court to require notice to be given by a party other than the representative plaintiff.

[268] ***Costs of notice.*** Under section 24 of the ULCC Act, the court may make an order with respect to the costs of notice and may apportion the costs among the parties (representative plaintiff of the main class, representative plaintiffs of any subclasses and defendants). This power appears to be included in the legislation whether or not the legislation allows costs to be awarded in the proceeding in general (ULCC Act, s. 37). It is also included in the British Columbia legislation which takes a "no costs" approach to costs in general.[246] We recommend its inclusion in Alberta.

RECOMMENDATION No. 9

(1) The representative party should be required to notify all class members of

- **(a) the certification of the class proceedings,**
- **(b) the resolution of common issues which have been resolved in favour of the class, which notice shall include notice of the right to attend and participate in the mandatory review of class counsel's fees and disbursements and give details of the scheduled review, and**
- **(c) an application for certification of a settlement class, in which case, in addition to other matters stipulated, the notice should state the terms of the settlement,**

---

[246] BC Act, *supra* note 6, s. 24.

but the court may dispense with the notice if it considers it proper to do so.

(2) In addition to the notice required under subsection (1), the court should be able to order that notice be given whenever the court considers it necessary to protect the interests of any class member or party, or to ensure the fair conduct of the proceeding.

(3) Court approval of the content of any notice and the method of delivery should be required before notice is given.

(4) With leave of the court, the representative plaintiff should be able to include in the notice of certification, a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.

(5) The court should have the authority to order a party to give the notice required of another party, and to make any order it considers appropriate as to the costs of any notice.

G. Common Issues and Individual Issues

1. Why the issue arises

[269] The common issue or issues may not be the only issues. Individual class members may have issues in addition to the issues that are common to the class. A means to resolve these issues is needed.

2. Rule 42

[270] Under rule 42, the question of individual issues does not arise because the claims made and relief sought on behalf of all class members must be the same.

3. Class proceedings precedents

[271] Under Canadian class proceedings regimes, subject to court order otherwise, common issues are determined together, common issues for a subclass are determined together and individual issues requiring the participation of individual class members are determined individually (ULCC Act, s. 11). In practice, common issues are usually decided first, then common issues for subclasses and, finally, individual issues. However, the court maintains control

over the conduct of the proceedings and may exercise its discretion to direct another course of progress.

[272] An order made in respect of a judgment on the common issues must set out the common issues, name or describe the class or subclass members, state the nature of the claims asserted and specify the relief granted (ULCC Act, s. 25). A judgment on the common issues binds every member of the class or subclass who is resident in the jurisdiction and has not opted out of the proceeding (ULCC Act, s. 26).

[273] Individual issues remaining after the determination of the common issues in favour of a class or subclass may be resolved on an individual basis in a manner specified by the court (ULCC Act, s. 27). As well, the defendant's liability to an individual class member may be assessed on an individual basis where individual proof of loss is necessary (ULCC Act, s. 28).

4. Consultation and recommendation

[274] The consultation indicated general satisfaction with the provisions dealing with common issues and individual issues in Canadian class proceedings regimes. However, concern was expressed that there may be situations in which those provisions unfairly bind a class member to a judgment on the common issues. We recommend that the court should have discretion to exempt from the binding effect of the judgment a class member who did not receive notice of certification or who did not respond to the notice in time by reason of mental disability. A person whom the court exempts would be free to bring an individual action. We would also make drafting changes that will clarify the position with respect to resident and non-resident class members.

RECOMMENDATION No. 10

(1) Unless the court orders otherwise,

- **(a) common issues for a class should be determined together,**
- **(b) common issues for a subclass should be determined together, and**
- **(c) individual issues that require the participation of individual class members should be determined individually.**

(2) A resolution of the common issues, whether by judgment or settlement, should bind every member of a resident class who has not opted out of the proceedings and every member of a non-resident class who has opted in to the proceedings; it should not bind a resident who opted out of the class proceeding; and it should not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out.

(3) With leave of the court, a class member who

- **(a) did not receive notice of the certification order, or**
- **(b) was unable by reason of mental disability to respond to the notice in time**

should be placed in the same position as a person who opted out of the class proceeding.

(4) The court should have the power to decide whether and how to determine individual issues that are not resolved by the determination of the common issues and to make individual assessments of liability where this cannot reasonably be determined without proof by those individual class members. In deciding how the individual issues will be determined, the court should be able to dispense with or impose any procedural steps or rules that it considers appropriate, consonant with justice to the class members and parties.

H. Court Role (Judicial Case Management)

1. Why the issue arises

[275] Judicial case management has become an important tool in the management of complex lawsuits. It is important to know whether that tool will be available in class actions and how the two procedures will be integrated.

2. Rule 42

[276] Rule 42 gives no guidance with respect to the use of judicial case management, so the usual rules would apply. The authority for case management is found partly in the inherent jurisdiction of the Court of Queen's Bench, under the *Judicature Act*, to manage the proceedings that come before it, and partly in a variety of Alberta Rules and Practice Notes that allow judicial case management, usually in the discretion of the court:

Rule 219 provides for a pre-trial conference at any stage of the proceeding on the application of a party or on the court's own motion.

Practice Note 2 requires a pre-trial conference to be held within three months of the direction that an action is to be tried by a civil jury, and thereafter as necessary.

Practice Note 3 provides more flexible mechanisms for case management through the use of one or more "pre-trial conferences." At least one pre-trial conference is mandatory for any trial set for longer than three days or a civil jury trial.

Practice Note 4 requires a pre-trial conference to be held prior to a certificate of readiness being filed in trials set for longer than five days.

Practice Note 7 automatically places under case management trials that are anticipated to take more than 25 days.

Rule 668 allows a party involved in a part 48 streamlined procedure action to apply for case management. *Rule 665* permits application for a pre-trial conference.

Rule 243 allows a party to move for directions respecting the pace or timing of procedural steps in an action.

Rule 244 permits the court to give directions for the expeditious determination of an action.

3. Class proceedings precedents

[277] Under Canadian class proceedings regimes, courts assume an active case management role in every case. They do so because most class actions are complex and because class actions determine the rights and obligations of persons not before the court. The management role encompasses a variety of matters, including: deciding on certification; making sure that the class is properly represented; scrutinizing the plan for the class proceeding; overseeing the conduct of the proceeding; tailoring the rules as necessary to accommodate the class

proceeding; playing an active role in managing the case; approving settlements and the class lawyers' fees and disbursements; and generally protecting the interests of the "absent" class members, that is, the class members whose interests are represented by the "representative plaintiff" but who are not themselves "party" to the proceeding.

[278] The regimes make it clear that the court has control over the conduct of the proceedings (ULCC Act, s. 12) and discretion to stay or sever any related proceeding (ULCC Act, s. 13). By exercising these powers, the court can effectively expand or contract the process if that appears necessary in the particular circumstances.[247]

[279] Usually, the same judge hears all pre-trial applications and may, but need not, preside at the trial of the common issues (ULCC Act, s. 14). However, in Ontario, the pre-trial judge may preside at the trial only with the consent of the parties (Ont. s. 34(3)).

[280] Provisions corresponding to section 12 of the ULCC Act have been interpreted in both B.C. and Ontario to provide the court with a flexible tool for adapting procedures on a case by case basis in ways that cannot always be readily anticipated. Courts in both B.C. and Ontario have used their equivalent provision to justify a court order approving a settlement with one defendant and barring any further action against that defendant.[248] This American style "bar order" has the effect of barring other defendants from looking to the settling defendant to share liability for damages if an award is made against them.

4. Consultation and recommendation

[281] In CM9, we asked whether any changes should be made to the existing judicial case management systems to accommodate class actions or whether the existing provisions are sufficient. The persons consulted expressed the view that the existing rules and practice notes provide appropriate mechanisms to assist the parties to move a case through its various stages. They did not see any need to

---

[247] McLennan Ross submission.

[248] *Ontario New Home Warrranty Program* v. *Chevron Chemical Company*, [1999] O.J. No. 2245, and *Sawatzky* v. *Societe Chirurgicale Instrumentarium Inc.*, [1999] B.C.J. No. 1814.

make changes to these rules and practices which, especially when combined with the provisions in Canadian class proceedings regimes, appear to provide ample scope for the exercise of the court's discretion to manage the conduct of class proceedings. They indicated that lawyers would expect some specialization of the judiciary to develop through the assignment of judges with specific responsibilities for class proceedings.

[282] ***Power to determine the conduct of a class proceeding.*** The court probably already enjoys the general power described in section 12 of the ULCC Act. That power derives from the court's inherent jurisdiction, its statutory power under section 8 of the Judicature Act, and the existing Alberta Rules. These are powers the court needs to be sure the class proceedings advance in a fair and effective manner. Nevertheless, for the sake of uniformity with class proceedings regimes in other Canadian jurisdictions and for greater certainty, we recommend the inclusion of section 12 of the ULCC Act.

[283] One might ask whether procedures such as "bar orders" should be expressly included in the Act. We think not. The flexibility of section 12, as worded in the ULCC Act, allows the court to craft novel and innovative procedural remedies. This flexibility will be invaluable as mass torts litigation in Canada evolves. Any attempt to codify procedures would thwart the intent of the legislation.

[284] ***Power to stay or sever proceedings.*** Having power to stay a proceeding enables the court to control what happens if a plaintiff opts out and starts another action. Having power to stay or sever a proceeding enables the court to control what happens to a case started earlier and fairly far along before the class action is commenced. It may be fairer to let the other case proceed rather than allow that plaintiff to suffer delay while the class action is dealt with. On the other hand, it may be better to postpone cases brought by plaintiffs who are not in the class proceeding until the class proceeding is disposed of. In short, the power to stay an action is a significant power and a necessary one. In our view, decisions about situations such as those we have just described are best left to the exercise of judicial discretion.

[285] The Alberta Rules, coupled with the court's inherent jurisdiction, already allow the court to stay or sever related proceedings. As in the case of section 12

and for the same reasons, we recommend the inclusion of section 13 of the ULCC Act.

[286] ***Trial judge.*** In multiple party situations in Alberta, one judge is appointed as the case management judge and a different judge is appointed as the trial judge. The roles are regarded as distinct. Consultation on CM9 favoured maintaining this distinction. We agree with the approach taken under Alberta's case management rules and in Ontario. We recommend that, absent the specific consent of all parties to the proceeding, the judge involved in the case management of a class proceeding ought not to be the trial judge.

RECOMMENDATION No. 11

(1) The court should have broad powers respecting the conduct of a class proceeding to ensure its fair and expeditious determination, including the power at any time to stay or sever any related proceeding.

(2) The judge who makes a certification order should hear all applications before the trial of the common issues, but should not preside at the trial except with the consent of the parties.

I. Discovery and Witness Examination

1. Why the issue arises

[287] Questions arise about the extent to which a class member should be treated as a party for the purpose of compelling evidence, or the extent to which a party can be compelled to obtain information from a class member. What is in issue here is the defendant's opportunity to discover all those have adverse claims. The challenge is to come up with provisions that are fair to defendants and also respect the goals of improved access to justice and increased judicial economy. Discovery of records and oral examination for discovery or interrogatories are important tools in litigation. In a particular case, a defendant may need to examine class members for discovery but defendants generally should not have an unlimited right to do so, as the availability of such a procedure would in some cases lead to inefficiency and delay. In addition, Alberta law allows any party to an action to examine a witness in order to obtain evidence for use on an application in the action. The question of the extent to which this is appropriate where the witness is a class member in a

class action should be addressed, as should the question whether a class member should be called on to respond to a notice to admit facts or an opinion as correct.

2. Rule 42

a. Discovery

[288] Rule 42 does not make special provision for discovery. Therefore, the general rules apply. The discovery rules are found in Part 13 of the Alberta Rules of Court. The rules ordinarily apply only with respect to parties to the litigation. They require the parties to file affidavits of, and produce or make available for inspection, "relevant and material" records. They also permit a party to examine orally under oath any other party who is adverse in interest, or employees of the other party. During discovery, a party can be compelled to enter into an undertaking to obtain information from a non-party. Rule 230 permits a party to call on another party to admit facts. In the case of *Western Canadian Shopping Centres Inc.* v. *Dutton*, the Alberta Court of Appeal authorized the treatment of class members as parties under rules 187 (discovery of records) and 201 (examination for discovery). These rules allow "a person for whose benefit an action is prosecuted or defended" to be "regarded as a party" for the purposes described. This case is now under appeal to the Supreme Court of Canada.[249]

[289] Rule 42 is silent about any requirement that a class member respond to a notice to admit facts or accept that an opinion is correct. Rule 230 allows a party to issue a notice calling upon another party to admit facts. Rule 230.1 is similar. It allows a party to call upon another party to admit as correct any written opinion included in or attached to the notice.

b. Examination as a witness

[290] Rule 42 does not make any special provision for the examination of a class member as a witness before an application in a class action. Here, too, the general rules apply. Rule 266 allows a party to examine a witness for the purpose of using this evidence upon any motion, petition or other proceeding before the court.

---

[249] Leave to appeal and cross-appeal on the procedural issues granted by the SCC, *supra* note 23.

Under this rule, the witness is the witness of the examining party and the examination is an examination-in-chief, not a cross-examination.[250]

3. Class proceedings precedents

a. *Discovery*

[291] Canadian class proceedings regimes give the parties to the proceeding (defendants and representative plaintiffs) the same discovery rights as they would have in any other action (ULCC Act, s. 17(1)). The provision refers simply to discovery; it does not identify oral discovery and record production, but it is apparent that both are intended. Where subclasses have been formed, the defendant's discovery rights extend to the representative plaintiff of each subclass. The difficult question has to do with the discovery of non-party class members. Canadian regimes allow the defendant to examine non-party class members; however, this cannot take place until after discovery of the representative plaintiff and then only with leave of the court (ULCC Act, s. 17(2)). Factors for the court to consider in making its decision are specified (ULCC Act, s. 17(3)). A class member who fails to submit to discovery is subject to the sanctions that apply to parties under the rules in that jurisdiction (ULCC Act, s. 17(4)).[251]

[292] It is important to note that this discussion focuses on the discovery of parties and class members on the common issues. As they could in ordinary litigation, defendants can discover class members on individual issues but individual class member discovery is more likely to occur after the resolution of the common issues (ULCC Act, s. 11(1)(c)).[252] It is also important to remember that Canadian class proceedings statutes give the court broad powers over the conduct of proceedings (ULCC Act, s. 12).[253]

[293] Case law interpreting the discovery provisions in Canadian class proceedings regimes is sparse. One reason is that once certification is granted, the

---

[250] See *infra*, heading R.3.e.

[251] The Quebec provisions go further than those in Ontario and B.C. by giving the parties the right to discover not only other parties but also any class member who has obtained the right to intervene in the action. A party may also apply for discovery of other class members. Quebec Art. 1019 C.C.P.

[252] Branch, *supra* note 77 at ¶ 14.10.

[253] Discussed *supra*, under heading H.

parties usually move quickly to settlement negotiation. The Ontario case of *Peppiatt* v. *Royal Bank of Canada*[254] emphasizes that the goal of promoting judicial economy cannot be allowed to override the ultimate goal of a just determination between the parties. In so saying, the judgment quotes from the Ontario Law Reform Commission:[255]

> Against the interest of class members in obtaining relief at minimal cost and inconvenience must be balanced ... the interest of the defendant in securing information important for the effective preparation and conduct of his case. ... Where a defendant cannot prepare his case without discovery of one or more absent class members, we believe that he has a legitimate interest in such discovery that should be weighed against that of the class members.

Because certification is seen to be "a fluid, flexible procedural process,"[256] able to "adjust to new developments,"[257] the information gathered on discovery may lead to a change in the common issues or reveal a need to form subclasses. In the *Peppiatt* case, documentary production and the examinations for discovery of the representative plaintiff indicated that a number of individual issues were involved. Rather than decertify the proceeding, the court chose to create subclasses and, in this way, give the defendants the opportunity to obtain discovery from the representative plaintiffs of those subclasses (fifteen in all).

b. Examination as a witness

[294] Canadian class proceedings regimes also allow the parties to be examined as witnesses prior to the hearing of an application. However, leave of the court must be obtained in order to examine a non-party class member as a witness (ULCC Act, s. 18(1)). In deciding whether to grant leave, the court must consider the factors set out in section 17(3) that apply to decisions about the discovery of class members (ULCC Act, s. 18(2)).[258]

---

[254] *Supra* note 211 at 477 (O.R.).

[255] OLRC Report, *supra* note 15, 63, vol. 3, at 626.

[256] *Bendall* v. *McGhan Medical Corp.*, *supra* note 203 at 747 (O.R.).

[257] Eizenga, Peerless and Wright, *supra* note 28 at §8.6.

[258] On one application for certification in Ontario, the judge took a different approach to the defendant's need to secure information. The judge ordered each of the class members to swear affidavits setting out the facts upon which they relied and allowed the defendant to cross-examine on these affidavits if necessary: *Maxwell* v. *MLG Ventures Ltd.* (1995), 54 A.C.S.W. (3d) 847 (Ont. Ct. (Gen. Div.)) [095/128/061-11pp.] (certification decision); further proceedings (unreported, September 14, 1995, 95-CQ-60022, Ont. Ct. Gen. Div.) (amending pleadings); (1996), 30 O.R. (3d) 304, 3

(continued...)

4. Consultation

[295] In CM9, we asked what changes, if any, should be made to the existing provisions on discovery, notice to admit facts, the examination of a class member as a witness on an application in a class proceeding or any other means of compelling evidence, in order to accommodate class actions.

[296] Most persons consulted expressed satisfaction with the ULCC provisions on the discovery of the representative plaintiffs for the main class and subclasses as of right and the discovery or examination as a witness of any other class member only with leave of the court. The need to have class proceedings run efficiently justifies treating class members differently from the parties to ordinary proceedings and placing clear restrictions on the examination of class members other than representative plaintiffs. Applying the *carte blanche* discovery process allowed under rule 42 in *Western Canadian Shopping Centres* v. *Dutton* defeats the objective of judicial economy sought for class proceedings. Conferring judicial discretion to grant exceptions to the restriction of discovery to the representative plaintiffs allows the court to balance the goal of procedural efficiency with defendant concerns about the loss of the right to discover class members as parties.

[297] On our initial reading of the discovery provision in Canadian class proceedings statutes, we had several questions about how that provision would operate. We asked ourselves whether it would be possible to provide more detail on how discovery would operate in a class proceeding. With this in mind, we considered a number of matters. After summarizing key points relating to discovery law, we describe this exploration and state our conclusions in the following paragraphs.

---

[258] (...continued)
C.P.C. (4th) (Gen. Div.) (determination of fee).

a. Discovery: general law

[298] Two purposes of discovery are well established.[259] One purpose is to gather information about the facts in order to enable the party examining to better assess his own case and that of the opposite party. In this regard, "a hearsay answer, even if not admissible at trial, may assist."[260] The other purpose is to gain admissions which may be used at trial as evidence against a party to the action.

[299] Some further points should be made. First, the "scope of examination for discovery is broad, with relevance or irrelevance being the primary limiting factor."[261] Because one purpose is to gather information that will help a party to assess their case, the admissibility at trial of the evidence obtained on discovery is not a consideration. Second, ordinarily, a person who is examined for discovery is required to give evidence only from their personal knowledge. An exception applies in the case of an officer selected to represent a corporation. That officer must inform himself of matters within the knowledge of anyone over whom he has control.[262] Third, discovery evidence can be used only against the party giving the evidence[263] and only by the party conducting the examination. In practice, however, in order to avoid endless repetition, it is almost always agreed that parties adverse in interest can also use the discovery evidence. Fourth, either party (the party discovered or the party reading in the discovery evidence) may contradict anything in that evidence read in that is unfavourable to them.[264]

---

[259] *Tremco Inc. et al.* v. *Gienow Building Products Ltd.* (2000), 186 D.L.R. (4th) 730, citing *Nichols & Shephard Co.* v. *Skedanuk* (1912), 5 Alta. L.R. 110 at 113, 4 D.L.R. 115 (C.A.); *Esso Resources Canada Ltd.* v. *Stgearns Catalytic Ltd.* (1993), 20 Alta. L.R. (3d) 327 (Q.B;.); *Leeds* v. *Alberta (Minister of the Environment)* (1989), 61 D.L.R. 672, 42 L.C.R. 114, 6 R.P.R. (3d) 152, [1989] 6 W.W.R. 559, 68 Alta. L.R. (2d) 322, *sub nom. Leeds* v. *Alta.*, 98 A.R. 178, 16 A.C.S.W. (3d) 365.

[260] *Wright* v. *Schultz*, [1992] A.J. No. 1206 (Alta. C.A.), at ¶22.

[261] *Tremco Inc. et al.* v. *Gienow Building Products Ltd.*, *supra* note 259 at para. [15].

[262] *Wright* v. *Schultz* (1993), 135 A.R. 58 [1992] A.J. No. 1206 (Alta. C.A.).

[263] *Syncrude Canada* v. *Canadian Bechtel Ltd.*, [1994] 4 W.W.R. 397 (Alta. C.A.).

[264] See e.g., *McDonald* v. *Shewchuk* (1962), 39 W.W.R. 384 (B.C.C.A.) where the court stated:

> There is no general rule that a party putting in discovery is bound by the answers. If a party, as part of his own case puts in unfavourable evidence from the discovery of an opposite party, and does not contradict it, he may be bound by it." However, "he may contradict that which is unfavourable by other evidence, and the court is then at liberty to weigh the whole evidence and in the circumstances of the particular case, may accept or

(continued...)

b. Discovery: representative plaintiff of the main class

[300] Under the current Alberta law, as a party, the representative plaintiff would be required to file an affidavit of, and produce or make available for inspection, "relevant and material" records.[265] The defendant would be able to examine the representative plaintiff orally under oath as a party adverse in interest.[266] The defendant could call on the representative plaintiff to admit facts.[267] To the extent that the evidence tendered and admissions made by the representative plaintiff on matters relevant to the common issues affects the outcome of the case, it would affect the interests of the members of the class.

[301] We considered whether the representative plaintiff of the main class should bear any responsibilities beyond those of a party in any other proceeding, and in particular we asked whether the representative plaintiff should have a duty to inform themself, beyond their own personal knowledge, on matters relating to the common issues. Such a duty might be fashioned by examining the duty the law places on a corporate officer selected to speak for the corporation to inform themself of information pertaining to the corporation.[268] An analogy could perhaps be drawn between the corporate officer and a representative plaintiff who speaks for members of the class who may have information that is not known to the representative plaintiff personally. In this analogy, non-party class members would be seen to be in a similar position to other officers and employees of the corporation.

[302] After examining the law governing the discovery of a selected corporate officer, we rejected this idea. Our reasons are these.[269] First, the duty of the corporate officer to inform themself is limited to acquiring information from

---

[264] (...continued)
reject such portions as it shall see fit, including the evidence given on discovery.

[265] Alberta Rules of Court, Part 13, Division 1, rules 186-199.

[266] Alberta Rules of Court, Part 13, Division 2, rules 200-216.1.

[267] Alberta rule 230.

[268] Alberta rules 200 (examination for discovery), 200.1 (selection of corporate officer) and 214 (read-ins).

[269] We give two additional reasons for rejecting the corporate analogy when we consider the discovery of class members: *infra* p. 121, para. [311].

persons over whom they have control, although they may be compelled to inquire from others. The representative plaintiff in a class proceeding is unlikely to have control over individual class members, although it is conceivable that exceptions may exist. One exception might be a situation (as permitted by ULCC Act, s. 2(4)) in which the representative plaintiff is an organization named to represent its members. Second, the law allows the corporation to select its own corporate officer. The trade-off is that the corporation should not be allowed to avoid providing relevant information about its affairs by selecting a poorly-informed officer. By way of contrast, the court determines that the representative plaintiff proposed for a class proceeding is an appropriate person to perform the role. One consideration in making this determination could be the ability of the person to give adequate discovery on the common issues.

[303] Our conclusion is that for discovery purposes, a representative plaintiff should be treated like a plaintiff in an ordinary proceeding. Individual class members should not be treated as corporate officers or employees of the representative plaintiff unless the representative plaintiff is a corporation and they are in fact officers or employees of that corporate representative plaintiff. On discovery, the representative plaintiff might be compelled to make inquiries of individual class members but would not be under a duty to inform themself.

c. *Discovery: representative plaintiff of a subclass*

[304] Under current Alberta law, the general law would apply to a representative plaintiff of a subclass in the same way that it would apply to the representative plaintiff of the main class.[270] However, the scope of the discovery would be determined by the common issues of the subclass, rather than the common issues of the main class.

[305] Questions arise about the use which ought to be able to be made of documents and evidence provided on discovery of the representative plaintiff of a subclass. As to the first purpose of discovery, the examination for discovery of a representative plaintiff of a subclass will assist the defendant to gather information about the facts and assess their position with respect to the subclass. Because the "scope of examination for discovery is broad, with relevance or irrelevance being

---

[270] See *supra* pp. 117-118, paras. [298]-[300].

the primary limiting factor,"[271] it may also help the defendant to assess their position with respect to the main class.

[306] As to the second purpose of discovery, to gain admissions, we asked whether statements relating to the common issues of the main class made on the examination for discovery of the representative plaintiff of a subclass should be admissible against the members of that subclass only, or whether they should become evidence in the case overall. In ordinary proceedings, discovery evidence is admissible only against the party who gave the evidence and not against others. Applying this principle would mean that the evidence given by the representative plaintiff of a subclass would only be admissible against that plaintiff and, therefore, indirectly (insofar as it affects the outcome of the case) against the members of the subclass being represented. It would not be admissible against the representative plaintiff and other members of the main class. Drawing this line of distinction is likely to be a challenge. We think the challenge can best be met by judges making determinations on the admissibility of evidence in the circumstances that arise in particular cases.

[307] We also asked whether records produced by the representative plaintiff of a subclass should be admissible as evidence against both the subclass and the main class. We expect that records produced by a representative plaintiff of a subclass and put in evidence at trial usually would become part of the evidence in the case as a whole.

[308] To sum up, in our view the discovery provisions in Canadian class proceedings regimes deal adequately with all of these matters. Resolution of the discovery issues that may arise is best left to the exercise of judicial decision on the basis of the particular facts and circumstances of the case before the court.

d. Discovery: non-party class members

[309] For the purposes of discovery under current Alberta law, a class member would be regarded as a party by reason of being "a person for whose benefit the

---

[271] *Supra* note 261.

action is prosecuted or defended."[272] Questions arise about the use which ought to be able to be made of documents produced and evidence provided by a class member in a class proceeding. As to the first purpose of discovery, the information obtained from the examination for discovery of a class member will assist the defendant to assess their position with respect to that class member. Because the scope of discovery is wide, it may also help the defendant to assess their position with respect to common issues of a class or subclass.

[310] As to the second purpose of discovery, to gain admissions, the existing law would allow discovery evidence obtained from a class member to be read in only against the class member discovered. We asked whether evidence obtained on the discovery of a class member that relates to the common issues of the main class or a subclass should become evidence in the case overall. We prefer to let the existing law operate, and leave it to the court to draw the line on when and how the evidence may be used.

[311] We considered whether it would be useful to draw an analogy between the treatment of discovery evidence given by a class member and discovery evidence given by a corporate officer or employee other than the officer selected to represent the corporation. Previously, we rejected the idea of drawing an analogy in order to impose a duty on the representative plaintiff in a class proceeding to inform themself about information relating to the class. Once again, we reject the adoption of any such analogy. Our reasons for doing so are these. First, the law governing the use that can be made of the discovery evidence given by corporate officers and employees other than the selected corporate representative is in a state of flux. Where relevant and material and otherwise admissible, employee discovery evidence that was once thought to be hearsay can now be read in.[273] Formerly, employee discovery evidence was excluded as hearsay unless the officer selected to represent the corporation admitted its truth. Now, the selected officer

---

[272] Alberta rules 187(3) (discovery of records); and 201 (examination for discovery); see e.g., *Western Canadian Shopping Centres* v. *Dutton*, *supra* note 23 at paras. [17] and [18]; leave to appeal and cross-appeal on the procedural issues granted by the SCC, *supra* note 23.

[273] *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.* (1993), 20 Alta. L.R. (3d) 327 (Alta. Q.B.) at 335, citing *Nova* v. *Guelph Engineering Co.* (1986), 57 Alta. L.R. (2d) 15; see also Glen H. Poleman, "Discovery Procedure and Practice: Recent Developments" (1996), 34 Alta. L.R. 352 at 354.

need only confirm that the employee's evidence is some of the information of the corporation. Once read in, the employee's evidence is treated as evidence to be weighed in the case. This change is giving practitioners difficulty. Second, the corporate officer must accept the information as information of the corporation, a single entity about which the corporate officer is obligated to know. In contrast, the information of a class member may or may not be the information of the class.

[312] Here again we asked whether records produced by a class member should be admissible as evidence against the main class or a subclass. And once again, we expect that records produced by a representative plaintiff of a subclass and put in evidence at trial usually would become part of the evidence in the case as a whole.

[313] These are practical questions which do not lend themselves to resolution in the abstract. To ensure that the court has the powers it needs to deal with them, we recommend the inclusion of a specific provision allowing the court to limit the purpose and scope of the discovery of a class member and the use that may be made of the evidence obtained. We also recommend the inclusion of a provision empowering the court to require the parties to propose which class members should be discovered. The purpose of such a provision would be to facilitate the selection of those class members who should be discovered in order to advance the litigation in light of the objectives of a modern class proceeding. The idea is based on the current practice of Alberta courts using unified judicial case management in litigation involving multiple claims against different defendants.

[314] We recommend the adoption of section 17 of the ULCC Act modified to include the recommendations made in the preceding paragraph. We are confident that the courts will apply their discretion under these provisions in a manner that is fair to the parties and consistent with the goals of class actions.

e. Examination as a witness before an application

[315] Rule 266 permits a party to examine a witness "for the purpose of using his evidence upon any motion, petition or other proceeding before the court or any

judge or judicial officer in chambers." The courts have interpreted this rule as follows:[274]

> 1. A party to an action is a witness and can be required to submit to an examination.
>
> 2. The party examining is bound by the answers given as if given during an examination-in-chief at trial and cannot cross-examine the witness. ...
>
> 3. There is a prima facie right to an examination, subject to the court's regulation of abuse of process as where the motion itself is an abuse, the onus of that abuse being on the party alleging it.
>
> 4. The purpose of the rule is to allow full disclosure. It is an instrument in the adversary process. The party seeking the disclosure is faced with the consequences of the responses given.

There are very few restrictions on when rule 266 may be used, "so long as it is to get information for a motion then pending, and is not merely a concealed examination for discovery ... One can even examine someone from the opposing side."[275] However, unlike discovery, a witness examined under rule 266 is "the witness of the lawyer who compels his attendance, who can only examine in chief, with no leading questions" and the opposing lawyer may cross-examine.[276] Moreover, "[p]resumably the main transcript goes into evidence, so any party can rely on any answer, as under R. 314."[277] Stevenson & Côté warn that the use of the rule can be dangerous, especially if the witness is unfriendly, of an unknown quantity, or from the opposing side.[278]

[316] It seems sensible, in the interests of promoting judicial economy in a class proceeding, to give the court discretion to decide when a party should be able to examine a class member as a witness. We recommend the adoption of section 18 of the ULCC Act, adapted to the language of rule 266.

---

[274] *Wawanesa Mutual Insurance Co.* v. *Schneider*, [1996] 1 W.W.R. 651 (Alta C.A.), at 654; see also *Millar* v. *Millar* (1996), 181 A.R. 247 (Alta. C.A.), at 249.

[275] Stevenson & Côté (3), *supra* note 41 at 242.

[276] *Ibid.* Apparently, in Ontario, the party examining is not bound by the answers given as if given during an examination-in-chief at trial, and can cross-examine the witness.: *Wawanesa*, *supra* note 274 at 654.

[277] *Ibid.*

[278] *Ibid.*

RECOMMENDATION No. 12

(1) (a) The defendant and representative plaintiff of a class or subclass should have the same rights of discovery against one another through record production and oral examination as would parties in any other proceeding.

(b) Class members should only be discovered after the discovery of the representative plaintiff, and then only with leave of the court which may impose any terms that it considers appropriate on the purpose and scope of the discovery and use of the evidence obtained.

(c) A class member should be subject to the same sanctions as a party for failure to submit to discovery.

(2) The court should be able to require the parties to propose which class members should be discovered.

(3) Leave of the court should be required to examine a class member as a witness for the purpose of using his evidence upon any motion, petition or other proceeding before the court or any judge or judicial officer in chambers.

(4) The court hearing an application for leave to discover class members or to examine a class member as a witness should be required to take into account

(a) the stage of the class proceeding and the issues to be determined at that stage,

(b) the presence of subclasses,

(c) whether the discovery is necessary in view of the defences of the party seeking leave,

(d) the approximate monetary value of individual claims, if any,

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered, and

(f) any other matter the court considers relevant.

J. Other Procedural Issues

1. Why the issue arises

[317] For the sake of simplicity, it is desirable that the class proceeding provisions be compatible with other rules and procedures.

2. Rule 42

[318] The Rules of Court apply generally to matters not covered by rule 42.

3. Class proceedings precedents

[319] Class proceedings regimes provide that the Rules of Court apply to the extent that they are not in conflict with the class proceedings provisions (ULCC Act, s. 40).

4. Consultation and recommendations

[320] We agree with the approach taken under rule 42 and in the Canadian class proceedings precedents. We recommend that the Rules of Court should apply to the extent that they are not in conflict with the provisions we recommend.

RECOMMENDATION No. 13
The Alberta Rules of Court should apply to class proceedings to the extent that those rules are not in conflict with these recommendations.

K. Settlement, Discontinuance and Abandonment

1. Why the issue arises

[321] A representative plaintiff has the power to settle, discontinue or abandon a class action. However, doing so affects the rights of class members. It is therefore necessary to consider whether class members need some special protection in such cases.

2. Alberta Rules

[322] Rule 42 is silent on the subject of settlement, discontinuance or abandonment. In ordinary actions, parties make their own settlements. To facilitate settlement, parties may avail themselves of rules 165 to 174 that provide for compromise using court process. If an action is resolved prior to judgment it must be discontinued. Rule 225 permits the plaintiff to discontinue an action at any time

before entry for trial, subject to payment of the defendant's costs. An action may also be discontinued before trial if all the parties consent. Otherwise, withdrawal or discontinuance requires leave of the court.

3. Class proceedings precedents

[323] Under Canadian class proceedings regimes, a class action cannot be settled, discontinued or abandoned without court approval (ULCC Act, s. 35). That is because the interests of class members are affected by the outcome and the court must ensure that their interests have been served by the decision. The court, which bears a considerable burden, is "entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances."[279] An American commentator gives eight factors that courts in the United States consider in relation to settlement:[280]

> (1) likelihood of recovery, or likelihood of success;
> (2) amount and nature of discovery evidence;
> (3) settlement terms and conditions;
> (4) recommendation and experience of counsel;
> (5) future expense and likely duration of litigation;
> (6) recommendation of neutral parties, if any;
> (7) number of objectors and nature of objections; and
> (8) the presence of good faith and the absence of collusion.

The ManLRC Report suggests that the court assess whether the settlement is fair, reasonable and in the best interests of those affected by it, with reference to a list of six factors followed by a catch-all clause:[281]

> (a) the settlement terms and conditions,
> (b) the nature and likely duration and cost of the proceeding,
> (c) the amount offered in relation to the likelihood of success in the proceeding,
> (d) the expressed opinions of class members other than the representative party,
> (e) recommendations of neutral parties, if any,

---

[279] Eizenga, Peerless & Wright, *supra* note 28 at 9.11, citing *Dabbs* v. *Sun Life Insurance Co. of Canada*, unreported (February 24, 1998), Toronto 96-CT-022862 (Ont. Gen. Div.), [1998] O.J. No. 1598, online: QL (OJ).

[280] Herbert B. Newburg and A. Conte, *Newberg on Class Actions*, 3rd ed. (Colorado: Shepard's/McGraw-Hill Inc., looseleaf) at s. 11.4 and 11.43.

[281] ManLRC Report, *supra* note 8 at 96, rec. 38.

> (f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members, and
>
> (g) any other matter the court considers relevant.

In protecting the interests of class members, even where it dismisses a class proceeding, the court must consider whether to require the representative plaintiff to notify class members (ULCC Act, s. 35(5)).

[324] Canadian class proceedings statutes do not require statutory notice of an application for court approval of a settlement. However, the parties sometimes announce the terms of the settlement in advance of the settlement hearing "in order to give class members an opportunity to attend the hearing, and potentially, to allow them a forum in which to state objections or voice concerns."[282]

[325] Courts in both Ontario and British Columbia have approved a settlement entered into prior to certification (sometimes called a "settlement class").[283] In such cases, the defendant's consent to the settlement is usually contingent on certification and court approval of the settlement terms.

4. Consultation and recommendations

[326] In CM9, we asked what provision, if any, should be made to ensure that the settlement, discontinuance or abandonment of a class action does not unfairly prejudice the rights of class members. The consultation supported the view that court approval should be required. The ULCC provisions were seen to be adequate.

[327] One respondent expressed support for the encouragement of settlement class certification. As in other litigation, early settlement saves time and expense. We note the point but do not think that it needs to be addressed in the provisions themselves.

[328] We previously discussed the issue of providing class members with mandatory notice of a settlement brought to court for approval and decided that

---

[282] Eizenga, Peerless & Wright, *supra* note 28 at 9.7, citing *Dabbs* v. *Sun Life Assurance Co. of Canada* (1998), 36 O.R. (3d) 770 at 778 (Div. Ct.).

[283] See e.g., *Haney Iron Works Ltd.* v. *Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565.

although it is important in every case that the court consider whether notice ought to be given, class members are best protected by leaving the decision to the court's discretion (see heading F on notice).

RECOMMENDATION No. 14

(1) No settlement, discontinuance or abandonment of the issues common to a class or subclass should be permitted without the approval of the court.

(2) In deciding whether or not to approve a settlement agreement, the court should be required to find that the agreement is fair, reasonable and in the best interests of those affected by it. In coming to that determination, the court should be directed to consider the following criteria:

- **(a) the settlement terms and conditions,**
- **(b) the nature and likely duration and cost of the proceeding,**
- **(c) the amount offered in relation to the likelihood of success in the proceeding,**
- **(d) the expressed opinions of class members other than the representative party,**
- **(e) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members,**
- **(f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members, and**
- **(g) any other matter the court considers relevant.**

(3) The court dismissing a class proceeding, or approving a settlement, discontinuance or abandonment, should be required to consider whether and how class members should be notified and whether the notice should include:

- **(a) an account of the conduct of the proceeding,**
- **(b) a statement of the result of the proceeding, and**
- **(c) a description of any plan for distributing any settlement funds.**

L. Monetary Relief

1. Why the issue arises

[329] In most class actions, the ultimate goal of the plaintiff class will be to obtain some form of monetary relief: a judgment or settlement that requires the defendant to pay money to members of the plaintiff class.[284] In some cases, efficiency and fairness will require that, once the common questions are decided, class members should pursue their claims individually. In other cases, efficiency and fairness will best be served by providing a global amount to be divided among class members. It is therefore necessary to consider whether the court should have special powers in making awards of damages in class actions.

2. Rule 42

[330] As interpreted by the courts, under rule 42 all class members must have the same damages or damages that can be calculated using the same formula. Subject to this, the damages are assessed individually.

3. Class proceedings precedents

[331] Canadian class proceedings regimes allow the court to make an order for an aggregate monetary award of damages with respect to the defendant's liability on the common issues.[285] Section 29 of the ULCC Act provides the authority for courts to make aggregate awards. Sections 30 through 34 deal with the mechanics of quantifying, apportioning and distributing aggregate awards. Statistical evidence may be admitted for the purpose of determining the amount of an aggregate monetary award, or how the award should be distributed among the class members (ULCC Act, s. 30). The court has power to order that the aggregate monetary award be shared on an average or proportional basis (ULCC Act, s. 31). The court may use this power where distribution on another basis would be impractical or inefficient, or where recovery would be denied to a substantial number of class members if the award were distributed on another basis (ULCC Act, s. 31(1)). Class members may apply to be excluded from the proposed distribution and given an opportunity to prove their claims on an individual basis (ULCC Act, s. 31(2)).

---

[284] The plaintiffs might also be seeking associated non-monetary relief, such as a declaration or injunction. In theory, the class plaintiffs might be seeking only non-monetary relief, but this seems unlikely to occur very often in practice.

[285] Aggregate assessment is provided in the Ont and BC Acts, *supra* notes 5 and 6, the ULCC Act, *supra* note 7, and other reformers and legislatures: see ManLRC Report, *supra* note 8 at 96-98.

Alternatively, the court may order that an aggregate monetary award be divided among class members on an individual basis (ULCC Act, s. 32). In this event, the court must specify the procedures for determining the individual claims, minimizing the burden on class members.

[332] It should be noted at this juncture that neither the ULCC Act nor other Canadian class proceedings provisions specifies a procedure for determining the monetary relief to which each class member is entitled if all or some portion of the defendant's monetary liability is to be dealt with through individual proceedings. Under the ULCC Act, it appears that this quantification would proceed in accordance with section 27 which deals generally with the procedure for disposing of individual issues.

4. Consultation and recommendations

[333] In CM9 we asked what, if any, provision should be made with respect to the relief that the court may order in a class action. Specifically, we asked whether the court should be empowered to award aggregate monetary damages.

[334] An initial question is whether aggregate assessment should be permitted at all and, if so, under what circumstances. Aggregate assessment is based on the premise that in many class actions it will be possible and appropriate to determine the defendant's total monetary liability, or some portion of it, without a detailed enquiry into the effect of the defendant's wrongful actions on any particular plaintiff. The technique involves quantifying the defendant's total liability in a single proceeding:[286]

> This involves a determination, in a single proceeding, of the total amount of monetary relief to which the class members are entitled, where the underlying facts permit this to be done with an acceptable degree of accuracy. Judgment is given for the aggregate amount, and the resulting award is then distributed in proceedings to which the defendant need not be a party.

Canadian class proceedings regimes provide for aggregate assessment. According to the Ontario Law Reform Commission, those who oppose aggregate assessment object that it is "unfair to defendants because the traditional procedures are not employed." The critics would prefer the alternative of requiring "separate individual proof from each class member in a series of 'mini-trials' ... complete with pre-trial discovery, oral testimony and cross-examination."

---

[286] OLRC Report, *supra* note 15, 63 at 532.

[335] The comments received on consultation supported the inclusion of the ULCC provisions on the award of monetary relief in class proceedings. The Law Society's Civil Practice Advisory Committee indicated their support in the following words:

> In appropriate circumstances there should be provision in the legislation to allow for the awarding of aggregate damages rather than having each member of the class individually have to prove their damages as against the Defendant. The ULCC provisions are comprehensive and adequately address this issue.

We agree that provision should be made for the award of monetary relief against a defendant in the form of aggregate damages and think that the ULCC provisions provide a solid foundation for doing so. However, we recommend some changes in the provisions governing the mechanics of aggregate awards.

[336] In the ensuing discussion, we consider what happens once the court has determined that the plaintiff class, or some members of the class, are entitled to monetary relief.[287] The issues that arise once this determination has been made fall into four categories: (1) quantification of the defendant's total monetary liability; (2) determination of the portion of the total award to which individual members of the plaintiff class are entitled; (3) distribution of the award to those entitled; and (4) dealing with any surplus of the award that might remain after all reasonable efforts have been made to distribute it to those entitled.

a. *Quantification of Liability*

i. Aggregate versus individual awards

[337] Aggregate assessment will be appropriate only if "the proof submitted is sufficiently reliable to permit a just determination [quantification] of the defendant's liability" without the benefit of specific evidence of the loss suffered by particular class members.[288] The key issue is whether it is possible to make a reasonably accurate quantification of the defendant's liability without enquiring into the effect of the defendant's wrongful conduct on particular members of the

---

[287] In this discussion we generally refer to the "class," but it should be kept in mind that an aggregate award might be made in favour of and apportioned amongst the members of a subclass.

[288] *Ibid*. at 555.

class. Section 29(1)(c) of the ULCC Act emphasizes that the court should make an "aggregate monetary award" only where the "aggregate or a part[289] of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members."

[338] Of course, liability must be a common issue before damages can be a common issue. That is to say, the court may make an aggregate award only after it has been determined that the defendant is liable to each member of the class or subclass whom the award would benefit (ULCC Act, s.29(1)(b)). Thus, if any of the necessary elements of the relevant cause of action (say, the element of actual reliance in a cause of action for negligent misrepresentation) is not a common issue, damages must be assessed on an individualized basis after the non-common elements of the cause of action have been established for any given class member.

[339] Section 30, dealing with the admission of statistical evidence, is the only provision that has anything to say about the mechanics of quantifying an aggregate award.[290] As shall be seen in the next paragraph, section 30 does not really add anything to the common law rules of evidence. Therefore, the ULCC Act effectively leaves the court to its own devices when it comes to the mechanics of quantifying an aggregate monetary award.

ii. Use of statistical evidence

[340] Section 30 of the ULCC Act allows the court, when deciding issues relating to aggregate awards, to admit statistical information that would not otherwise be admissible as evidence. We question the need for this provision under the current law. Like other provisions relating to aggregate assessment, this provision is based on a recommendation by the Ontario Law Reform Commission. In 1982, when the Ontario Report was issued, the admissibility of statistical evidence under the traditional law of evidence was uncertain. Statistical evidence is hearsay evidence because the information relied on in formulating the statistics cannot be tested from the personal knowledge of witnesses in court. In 1982, to be excepted from the hearsay rule, hearsay evidence had to be brought within one of a number of

---

[289] The reference to "a part" of the defendant's liability being determined through aggregate assessment contemplates a situation where some members of the class may have suffered additional losses which go beyond those that can be proved by common evidence.

[290] ULCC Act, *supra* note 7, ss. 31 and 32 deal with the mechanics of distributing the award.

rigid categories. In the years since 1982, the common law of evidence has advanced to the point where the admissibility of hearsay evidence depends on its reliability and practical necessity. Today, where an expert witness has formed "an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise,"[291] the hearsay statements incorporated into the expert's testimony may be taken as evidence for the factual premises upon which the expert's opinion is based. This can occur if the evidence is "reasonably necessary and reliable"[292] for the purpose of proving facts in issue in a lawsuit. Given these flexible criteria, a court that held that statistical evidence was inadmissible under the common law rules of evidence would be explicitly or implicitly concluding that the evidence was either unnecessary or unreliable. It is difficult to imagine that the same court would then be prepared to turn around and admit the statistical information under section 30(1). Therefore, we do not believe that a provision along the lines of section 30 would serve any real purpose, and we do not recommend that Alberta class actions legislation include such a provision.[293]

b. Apportionment of aggregate awards

[341] Once the defendant's total liability under an aggregate award has been quantified, it will be necessary to apportion the award amongst members of the relevant class or subclass.[294] The ULCC Act contemplates two basic alternatives for apportioning an aggregate award. Section 32 provides for apportionment "on an individual basis" and section 31 provides for apportionment "on an average or proportional basis." We will comment on the two alternatives in the reverse order in which they appear in the ULCC Act because individual apportionment is actually the default method of distribution. This is made clear by section 31(1),

---

[291] *R.* v. *Lavallee*, [1990] 1 S.C.R. 852 at 899-900 *per* Sopinka, J.

[292] *Ferguson* v. *Ranger Oil*, [1997] A.J. No. 100 at para. 15.

[293] These statements are based on the analysis contained in a research paper on monetary relief in class actions prepared in August 2000 by Richard H. Bowes, one of the Institute's Counsel. We note that the Ont and B.C. Acts, *supra* notes 5 and 6, both contain a provision very similar to ULCC Act, *supra* note 7, s. 30, and the ManLRC recommended such a provision for Manitoba: ManLRC Report, *supra* note 8 at 1998. Notwithstanding the weight of numbers, we are not convinced that a provision based on the ULCC Act, *ibid.*, would serve any purpose in Alberta legislation.

[294] In this discussion we generally refer to the "class," but it should be kept in mind that an aggregate award might be made in favour of and apportioned amongst the members of a subclass.

which authorizes average apportionment only if individual apportionment would be impractical or inefficient and would deny recovery to a substantial number of class members.

i. Individual apportionment

[342] As the default method of apportioning aggregate awards, individual apportionment will be used unless the circumstances are such that it will be fair to use average apportionment. We doubt that this will occur in many cases.

[343] We recommend that Alberta class proceedings legislation should incorporate section 32 of the ULCC Act with the following clarifications. Firstly, it should be made clear that when a court is asked to allow a late claim under section 32(5), one of the conditions should be that this will not cause substantial prejudice to any person (most likely, other class members), rather than "to the defendant" as is implied by section 32(6)'s incorporation of section 27(6). Secondly, and most importantly, any provision based on section 32(7) should make it clear that the judgment cannot be amended so as to increase the amount of an aggregate monetary award. Section 32 is concerned with apportionment between class members of an aggregate award that has already been quantified. It would be anomalous if the fact that a class member is allowed to make a late claim for a share of an aggregate award that has already been quantified should open up the possibility of the award being increased. Once the court has embodied its conclusion as to the appropriate amount of an aggregate award in a judgment, the defendant should at least have the assurance that its maximum liability has been fixed.

ii. Average apportionment

[344] We believe that an average apportionment is an appropriate approach where individual apportionment would be impractical or inefficient. We see no need to make any changes to section 31 of the ULCC Act.

c. *Distribution of aggregate awards*

[345] Section 33 of the ULCC Act provides the court with great flexibility in directing how an aggregate award is to be distributed once it has been quantified and apportioned. The distribution mechanics envisaged by this section include distribution by the defendant directly to those entitled. Section 33(2)(a)

contemplates that where the court orders distribution by the defendant, it may specify that the distribution is to be by means of abatement or credit. The court is also authorized to give the defendant time to pay a judgment or pay it by instalments.

[346] We recommend that Alberta class proceedings legislation adopt section 33 of the ULCC Act without any substantive changes. The only change that we would recommend is in section 33(4), where the references to "execution" of a judgment should be to "enforcement" or to "enforcement proceedings," in keeping with the terminology of the *Civil Enforcement Act*.

d. Dealing with undistributed portion of aggregate award

[347] After all reasonable efforts have been made to apportion an aggregate award between class members and to distribute the award among those entitled, a substantial portion of the award might remain undistributed. There are various reasons why this might occur. One possibility is that the technique employed by the court to quantify the aggregate award overestimated the plaintiffs' collective loss. Other possibilities relate to the difficulty and expense of identifying everyone who may be entitled to share in the award, quantifying their entitlement, and paying them the amount to which they are entitled.

[348] The appropriate approach to disposing of the undistributed portion of an aggregate award is controversial. Section 34 of the ULCC Act contemplates two possible mechanisms. Both draw on recommendations made in the OLRC report. The first mechanism is what the OLRC Report refers to as a *cy-près* distribution.[295] Section 34(1) allows the court to order that the otherwise undistributable portion of an aggregate award be applied "in any manner that may reasonably be expected to benefit class or subclass members." This mechanism can be employed even if the order would benefit non-class members or "persons who may otherwise receive monetary relief as a result of the class proceeding" (ULCC Act, s. 34(4)). The second mechanism, in section 34(5), can be thought of as the "last resort" means of dealing with the portion of an award that cannot be distributed to individual class members. Section 34(5) provides that the court may order the undistributed portion to be applied to the costs of the proceedings, forfeited to the Government, or

---

[295] OLRC Report, *supra* note 15, 63, vol. 2 at 572-82.

returned to the defendant.[296] It provides no guidance as to how the court should decide between these options.

i. Cy-près distribution

[349] *Cy-près* distribution offers a means of providing an indirect benefit to class members where it is impractical to provide a more direct benefit by distributing the monetary award (or some portion of the award) to individual class members. Alternatives would be to return the undistributed portion of the award to the defendant or forfeit it to the government. Both Ontario and British Columbia allow the court to make a *cy-près* distribution as the first option. We agree that in appropriate circumstances the court should be able to order a *cy-près* distribution of the portion of an aggregate award that cannot be distributed directly to individual class members. Accordingly we recommend that Alberta class proceedings legislation incorporate provisions based on sections 34(1)-34(4) of the ULCC Act.

ii. Undistributed residue

[350] The next question is what to do with any portion of an aggregate award that is not disposed of by individual or *cy-près* distribution. The OLRC considered two alternatives: return the undistributed portion to the defendant or forfeit it to the government. Under the Ontario Act, any undistributed portion of an aggregate award must be returned to the defendant; forfeiture to the government is not an option. British Columbia, the ULCC Act and the ManLRC allow any undistributed surplus to be returned to the defendant or forfeited to the government or, in an additional option, applied "against the cost of the class proceedings."

[351] According to the OLRC's analysis, the choice between returning the undistributed residue to the defendant or forfeiting it to the government would depend on whether the purpose of the monetary award was wholly compensatory or was at least partly for the purpose of "behaviour modification" or deterrence. If

---

[296] The precise words of s. 34(5)(c) are "be returned to the party against whom the award was made." This seems to assume that there is a fund that could be "returned" to the defendant (or alternatively, "forfeited" to the Government). In many cases, though, it seems more likely that all there will be is an outstanding judgment against the defendant that has been only partially satisfied; there will be no fund, as such, to return to the defendant. In such cases, it would seem more accurate to say that the court would be authorized to extinguish the judgment, even though it has not been fully satisfied through individual or *cy-près* distribution.

its purpose was exclusively compensatory, and it was impossible to distribute a portion of the award to those who were intended to be compensated, the only rational course of action would be to return the undistributed portion to the defendant. If, on the other hand, a substantial purpose of the monetary award was deterrence, then returning the undistributed portion of the award to the defendant could undermine this objective.[297]

[352] Having set out these premises, the OLRC Report then considered whether, or in what circumstances, monetary awards are, or should be, designed to serve the purpose of behaviour modification in civil actions generally, or class actions in particular.[298] The report pointed out that the only possible rationale for certain types of monetary awards – most notably, punitive damages – is that they are intended to serve a deterrent function.[299] Moreover, even where there is clearly a compensatory rationale for monetary awards, it is generally accepted that the monetary award (or more accurately, the *prospect* of having to pay a monetary award) also plays a role in encouraging socially optimal conduct.[300]

[353] The OLRC majority concluded that deterrent function of an aggregate damages award could be compromised if there was an automatic requirement to return the undistributed residue of such an award to the defendant. On the other hand, it also concluded that a rule calling for automatic forfeiture would also be

---

[297] *Ibid*. at 582.

[298] *Ibid*. at 583-90.

[299] *Ibid*. at 585-88.

[300] *Ibid*. at 583-85, 588. The following passage from the principal judgment in *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at [para. 196 of QL version] is notable because it emphasizes both the pure-deterrent function of punitive damages and the dual compensatory-deterrent role of ordinary damages:

> Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

inappropriate. It concluded, therefore, "that Ontario courts should be given a broad and flexible discretion to choose between a forfeit distribution and the unconditional return of the residue to the defendant, depending on the facts of the particular case."[301]

[354] We agree with the OLRC's majority argument that the appropriate disposition of the undistributed portion of an aggregate award will depend very much on the facts of the individual case. We recommend that the court be given a discretion as to the ultimate disposition of such a residue. However, we believe that the court should be given some statutory guidance as to the basis upon which this discretion should be exercised.

[355] In our view, there should be a statutory presumption that the undistributed portion of an aggregate monetary reward will be returned to the defendant.[302] This presumption would be overcome if, in the opinion of the court, returning the undistributed portion to the defendant would be inappropriate in all the circumstances of the case. An obvious example of where it would be likely to be regarded as inappropriate to return the residue of the award to the defendant is where the award consists of punitive damages.

[356] If the court decides that it would be inappropriate to return the residue to the defendant, we recommend that its disposition should be in the discretion of the court, without the constraints set out in section 34(5) of the ULCC Act. For example, if the aggregate award consists largely of punitive damages, it would not seem illogical to dispose of the residue through a supplementary distribution to class members who had already received a portion of the award. Since the punitive damages award was not intended to be compensatory, there is no issue of class members being overcompensated by such a supplemental distribution.

[357] We make one further point. Section 34(5) refers only to section 32(1) which has to do with average apportionment. The problem of an undistributed residue

---

[301] OLRC Report, *supra* note 15, 63, vol. 3 at 596.

[302] As noted earlier, it may be that "returning the undistributed portion of the award to the defendant" will consist of something along the lines of an order stipulating that the judgment has been fully satisfied, rather than an actual transfer of funds to the defendant.

could arise whether the shares have been determined by individual apportionment or average apportionment. That is because individual and average apportionment are merely alternative means of deciding how to divide an aggregate award between class members – they both contemplate that the proceeds of the award will be paid to individual class members. The equivalent of section 34(5) in Alberta class proceedings legislation clearly should apply to the undistributed portion of an aggregate award, regardless of the method (section 31 or section 32) by which the award was apportioned between class members, and we so recommend.[303]

RECOMMENDATION No. 15
The court should be authorized to make an aggregate assessment of monetary relief in respect of all or any part of a defendant's liability to class members if:

(a) monetary relief is claimed,

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(c) the aggregate or a part of the defendant's liability can reasonably be determined without proof by individual class members.

RECOMMENDATION No. 16
The court should be able, for purposes of determining issues relating to the amount or distribution of aggregate monetary relief, to admit as evidence statistical information but no provision to this effect is necessary because the development of the common law of evidence has made such a provision redundant.

---

[303] The OLRC's draft bill expressly dealt with undistributed residue of an "average distribution:" OLRC Report, *supra* note 15, 63, (draft bill s. 28), vol. 3 at 871.

RECOMMENDATION No. 17

(1) The court should be able to specify procedures for the determination of individual claims where this is necessary to give effect to the order.

(2) Where the court specifies procedures for the determination of individual claims, it should set a reasonable time within which the claims must be made, after the expiration of which claims should be able to be made only with leave of the court.

(3) In deciding whether to grant leave to make a late claim, the court should consider whether any other person would suffer substantial prejudice.

(4) The court should be able to amend a judgment respecting the award of aggregate monetary relief but not so as to increase the amount of an aggregate award.

RECOMMENDATION No. 18

The court should have power to order that an aggregate award shall be shared by class members on an average or proportional basis.

RECOMMENDATION No. 19

The court should be able to make orders for the distribution of aggregate awards of damages by any means that it considers appropriate.

RECOMMENDATION No. 20

(1) The court should be able to order that all or any part of an aggregate award that has not been distributed within a time period set by the court be applied in any manner that may reasonably be expected to benefit class members.

(2) The court should be permitted to order that all or any part of an aggregate award that remains unclaimed or otherwise undistributed after a period of time set by the court, be applied against the cost of the class proceeding, forfeited to the government, or returned to the party against whom the order was made.

(3) The presumption should be that the undistributed amount will be returned to the party against whom the monetary award was made, unless the court considers that in all the circumstances it would be inappropriate to do so.

(4) If the court declines to order the undistributed amount to be returned to the party against whom the award was made, its disposition should be in the discretion of the court.

M. Appeals

1. Why the issue arises

[358] In reviewing class action procedures, it is desirable to consider whether or not the rules for appeals in ordinary actions will operate satisfactorily in class actions.

2. Rule 42

[359] Rule 42 is silent with respect to the right of appeal so the general rules apply. Rule 505 allows appeal as of right to the Court of Appeal from the decision of a judge of the Court of Queen's Bench sitting in court or in chambers. The appeal can be taken only with leave of the Court of Queen's Bench where the parties consented to the decision, or the decision is as to costs only, or the controversy involves a sum estimable at $1,000 or less, exclusive of costs.

3. Class proceedings precedents

[360] Canadian class actions regimes allow appeals to be taken from a certification order, judgment on common issues or judgment on individual issues, but the provisions differ from jurisdiction to jurisdiction.

[361] ***Judgment on common issues***. Canadian class proceedings regimes allow any party to appeal a judgment on the common issues or an order respecting an aggregate award (ULCC Act, s. 36(1)). This appeal may be taken without leave.

[362] ***Judgment on, or dismissal of, individual claim***. In British Columbia and under the ULCC and ManLRC recommendations, any party or class member may appeal an order determining an individual claim or dismissing an individual claim for monetary relief (ULCC Act, s. 36(2)). Leave of a justice of the appellate court

is required. In Ontario, appeals of awards of more than $3,000 may be taken to the Divisional Court without leave. Appeals of awards of $3,000 or less, or the dismissal of an individual claim, require leave of the Ontario Court (General Division). (For further refinements, see ULCC Act, s. 36, note [1].)

[363] ***Certification order***. In British Columbia and under the ULCC and ManLRC recommendations, any party may appeal a certification order, an order refusing certification, or a decertification order (ULCC Act, s. 36). Leave of a justice of the appellate court is required under the ULCC and ManLRC recommendations, but not in BC. Ontario requires the leave of the Ontario Court (General Division) in the case of a certification order, but not otherwise. The reason for the Ontario leave requirement is a concern that defendants with a right of appeal would appeal in every case, thereby delaying the class proceeding.[304]

[364] In certain circumstances, a class member may apply for leave to act as the representative plaintiff for purposes of an appeal on certification, judgment on the common issues or a judgment of aggregate damages (ULCC Act, s. 36(4) and (5)). This may occur where the representative plaintiff does not appeal, or seek leave to appeal, the order or judgment within the time permitted, or abandons an appeal.

[365] Other appeals would follow the ordinary appeal rules.

4. Consultation and recommendations

[366] In CM9, we asked what, if any, changes should be made to accommodate appeals in class actions. The primary view expressed on consultation was that all appeals on common and individual issues should be as of right; there should be no leave requirements and no monetary limit other than those limits that are contained in the existing Rules of Court.

[367] Views differed slightly when it came to the appeal of a certification order. One argument was that the certification of a class action is a significant judicial determination and the appeal of this decision should be treated under the ordinary rules of appeal. A contrary argument was that leave to appeal certification should

---

[304] Sullivan, *supra* note 63 at 130. Leave was refused in *Nantais* v. *Telectronics Proprietary (Canada) Ltd.*, *supra* note 203.

be required because defendants can effectively frustrate the process with appeals. The early experience under the B.C. Act, which does not require leave, bore out the concern about defendant appeals.

[368] On balance, we recommend against the inclusion of a requirement that the defendant obtain leave to appeal a certification order. Our recommendation preserves consistency with the rule for ordinary litigation and is, we think, fair to plaintiffs and defendants.

RECOMMENDATION No. 21

(1) Appeals from certification or decertification decisions should be available to both plaintiffs and defendants.

(2) Any party should have the right to appeal to the Court of Appeal of Alberta against

- **(a) a judgment on common issues, or**
- **(b) an aggregate damages award.**

(3) A class or subclass member, a representative plaintiff or a defendant should have the right to appeal to the Court of Appeal against any order determining or dismissing an individual claim, including an individual claim for monetary relief.

(4) A class or subclass member should be able to apply to the Court of Appeal for leave to act as the representative plaintiff and bring an appeal if a representative plaintiff has not appealed within the time limit specified for bringing an appeal or has discontinued an appeal.

(5) Unless the court orders otherwise, leave under subsection (4) should be required to be sought within 30 days after the appeal period available to the representative plaintiff has expired or the notice of discontinuance was filed.

N. Costs as Between Parties

1. Why the issue arises

[369] "Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation. For people caught up in the legal system it can

become an intolerable burden."[305] How costs are dealt with in a class proceeding is therefore extremely important. On the one hand, in a class proceeding, representative plaintiffs are unlikely to be willing to act if they will be liable for defendants' costs, and such reluctance may defeat the intention of class action rules. On the other hand, the considerations that entitle defendants to be paid their costs in ordinary actions apply in class actions. Costs therefore raise difficult and important issues in class actions.

2. Rule 42

[370] Rule 42 does not say anything about costs. Costs therefore follow the ordinary rules. The general rule governing costs between parties is rule 601. It gives the court broad discretion in awarding costs. This discretion is "subject to any rule expressly requiring costs to be ordered" (rule 601(1)). In practice the general rule is that costs are awarded to the successful litigant. The court may decide not to award costs at all. Where it does award costs, the court may decide the scale of costs. According to Stevenson and Côté, in a representative action "individual members of the group are jointly and severally liable for costs."[306]

3. Class proceedings precedents

[371] Under Canadian class proceedings regimes, the representative plaintiff is responsible for costs. These regimes provide "cost and fee provisions that are designed to ensure that the representative plaintiff is not required to assume a burden of costs which would, in effect, preclude their participation, and to ensure that lawyers will be willing to take on class proceedings on behalf of representative plaintiffs."[307] Class members are liable only for costs having to do with the determination of their own individual claims (ULCC Act, main s. 37(1); ULCC Act, alternative s. 37(4)).

[372] Differences of opinion exist about how costs relating to the common issue should be dealt with. Jurisdictions adopting the ULCC Act are given a choice between two alternative approaches.

---

[305] Eric T. Spink, "Party and Party Costs – Executive Summary", ALRI internal research paper (February 26, 1996) at 6 citing Australian Law Reform Commission.

[306] Stevenson & Côté (2), *supra* note 29 at 53.

[307] ManLRC Report, *supra* note 8 at 16.

[373] Ontario and the main ULCC provision illustrate one approach to costs. They give the court discretion to award costs against the parties much as it would in an ordinary action (ULCC Act, main s. 37). However, in deciding upon costs, they also give the court license to consider whether the class proceeding was a test case, raised a novel point of law or addressed an issue of significant public interest. The court also has a discretion as to how it determines costs. As a matter of practice, generally the Ontario courts have taken a cautious approach to the award of costs against the representative plaintiff.[308] Quebec legislation also allows the court to order costs. However, there "the normal tariff has been altered to minimize the effect on the representative of an adverse costs award."[309] "In effect, the scale is reduced to that which can be awarded in litigation where the amour in issue is between $1,000 and $3,000."[310]

[374] Ontario and Quebec have both established funds to assist representative plaintiffs with the funding necessary to commence class actions and the payment of costs if costs are awarded against them. In Ontario, the government established a "Class Proceedings Fund" at the same time that the Ontario *Class Proceedings Act, 1992* took effect.[311] The fund was established by a $500,000 endowment from the Law Foundation of Ontario which also administers it. Monies are available from the fund to assist the representative plaintiff to pay disbursements so that the class action can proceed. If the plaintiff fails in the action, monies from the Fund are also available to indemnify the representative plaintiff for costs awarded in favour of the defendant. In order to replenish the fund, a levy is made on a successful settlement or judgment in favour of a representative plaintiff and class that has received financial assistance.[312] The Quebec fund, which operates in a similar manner, is reported to be more generous than Ontario with funding to

---

[308] But see *Garland* v. *Consumer Gas* [2000] O.J. No. 1684 (Winkler J.).

[309] Branch, *supra* note 77 at 19-5, citing Quebec Art. 1050.1 C.C.P.

[310] *Ibid.*

[311] *Law Society Amendment Act (Class Proceedings Funding), 1992*, S.O. 1992.

[312] The levy consists of the amount of any financial support paid plus 10 per cent of the award or settlement funds to which the representative plaintiff and any member of the class is entitled: Ont. Reg. 77/92, s. 10. A judgment authorizing a settlement, discontinuance or abandonment must give directions regarding the payment of any levy in favour of the fund: rule 12.05(1)(d) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (enacted O. Reg. 770/92, s. 5).

commence a class action. However, it does not indemnify the plaintiff from having to pay costs; instead, it permits a defendant who has not been able to collect costs to apply for payment out of the fund. The Quebec fund is maintained by a levy made on every class action award granted.

[375] British Columbia, the ULCC alternative and ManLRC recommendations illustrate the second approach to costs. They prohibit the court from awarding costs in the class action to any party (ULCC Act, alternative s. 37(1)). The prohibition is subject to exceptions for: vexatious, frivolous or abusive conduct; improper or unnecessary steps; or "exceptional circumstances that make it unjust to deprive the successful party of costs" (ULCC Act, alternative s. 37(2)). In British Columbia, the protection from an adverse cost award does not apply unless the action is formally certified as a class action. If the action is dismissed prior to the certification hearing, the normal rules apply.[313]

[376] The issue whether or not the court should be able to award costs against the representative plaintiff in a class action is a difficult one to resolve. On the one hand, the potential burden of costs may weigh so heavily that plaintiffs with deserving claims will be discouraged from bringing them to court. On the other hand, costs operate as a useful deterrent against the bringing of unreasonable claims and there is merit in this as well. The challenge is to strike a fair balance between the rights of potential plaintiffs and defendants. Canadian jurisdictions have chosen different solutions. We note that different rules regarding costs among Canadian jurisdictions may encourage parties to shop for a forum in which they will be better off. This prospect is not one to be encouraged.

4. Consultation and recommendations

[377] In CM9, we asked what, if any, provision should be made with respect to the award of costs in class actions. Responses varied widely, serving to accentuate the disparity between the Ontario and British Columbia approaches. Before arriving at our recommendations on costs, in the following paragraphs we give various rationales for awarding costs, set out arguments for and against cost or "no cost" approaches and highlight certain public interest considerations.

---

[313] *Edmonds v. Actton Super-Save Gas Stations Ltd.* (1996), 5 C.P.C. (4th) 105 (B.C.S.C.).

a. Rationale for costs

[378] Unfortunately, the purpose of awards that shift costs from one party to the other is far from clear. Various theoretical rationales have been posited:[314]

> *Fairness / indemnity*
>
> The successful party should not suffer financially for establishing their position through litigation. Justice requires the loser to pay. The winner has an inherent right to costs. Various exceptions may be made: e.g., when the outcome is not certain, a new issue is involved, or in public interest litigation (civil rights or environmental cases).
>
> *Compensation for legal injury*
>
> This is the 'make whole' rationale. It has foundations in both equity and economics. The costs of the successful party are one component of their damages, and should be paid by the injurer. Where the indemnity rationale awards costs against losers, compensation theory is based on *fault*. So, a winner who has abused the litigation process may have to pay costs. In some systems (e.g., the U.S.) it is not a legal wrong to bring a losing case or an unsuccessful defence, so there is no fault unless someone abuses the process.
>
> *Punitive shifting*
>
> Undesirable behaviour must be punished. it reflects many of the same goals as compensation. However, when indemnity and compensation have been expressly rejected (as in the U.S.), punishment may still justify fee-shifting. In extreme cases, legal fees become part of punitive damages.
>
> *Private attorney-general theory*
>
> In public interest litigation, the loser should not be penalized for participating in good faith. Costs may be shifted to a government body in an effort to encourage such litigation. Theoretically, concerns about frivolous suits do not arise in public interest litigation since, by definition, a public interest case has a serious issue to be tried.
>
> *Affecting relative strengths of parties*
>
> This applies where the litigating parties have unequal power, such as in personal injury litigation where the plaintiff has fewer resources and less experience than the defendant/insurer. A one-way fee shift in favour of the plaintiff reduces the imbalance, but may also encourage frivolous claims.

---

[314] Spink, *supra* note 305, citing T. Rowe Jr., "The Legal Theory of Attorney Fee-Shifting: A Critical Overview" (1982) Duke L.J. 651.

> *Economic incentives*
>
> All the various fee-shifting rules are occasionally justified on the basis that they provide economic incentives that encourage desirable litigation, or discourage undesirable litigation, or both. Arguable:
>
> - high levels of fee-shifting may discourage weak or uncertain claims by creating the prospect of paying two sets of legal fees, and may encourage valid claims, especially small claims, by shifting the bulk of all the fees to the loser; and
> - low levels of fee-shifting may discourage smaller claims (weak or strong), but encourage weak or uncertain claims that are large enough to warrant a contingency fee arrangement
>
> Although fee-shifting certainly has some influence on litigants' behaviour, there is no empirical evidence that any particular costs system reliably differentiates between "desirable" and "undesirable" litigation. Fee-shifting rules are only a part of the larger and very complex economic incentives that operate in litigation.

[379] In the past, costs have been something of a blunt instrument. A current trend sees costs being used more effectively within the context of case management, to improve the general conduct of litigation. This is the approach endorsed in the Woolf Report where it is recommended that:[315]

- as case management breaks down the issues which make up the litigation, different orders for costs may be made in relation to the different issues;
- before accepting litigation retainers, solicitors should be required to provide certain information about how fees are calculated and what the overall costs might be; and
- costs incurred to date, and the prospective future costs, should be disclosed to the judge and other party at the case management conference and pre-trial review.

b. Arguments for and against costs

i. Plaintiff perspective: for costs

[380] Arguments favouring costs, when looked at from the plaintiff's perspective, include:

---

[315] Spink, *ibid.*

- litigation costs can be substantial and representative plaintiffs may want to know that, if they succeed, they will recover their own costs;
- defendants focus their energies on blocking a certification and this involves a significant expense to both plaintiffs and defendants;
- the goal of access to justice justifies orders that certification costs be payable to the plaintiff forthwith in order to save the plaintiff from having to carry the heavy financial burden of certification costs (Ontario case law); and
- the possibility that defendants will have to pay the plaintiff's costs may operate as an inducement for defendants to settle.

ii. Plaintiff perspective: against costs

[381] Arguments against costs, when looked at from the plaintiff's perspective, include:

- plaintiff liability for costs may impede access to justice for claimants with deserving claims – potential representatives may be deterred from bringing a class action if they face liability for costs if unsuccessful thus defeating the access to justice objective of class proceedings; and
- lawyers may not be willing to take on class proceedings on behalf of representative plaintiffs if they have to assume a burden of costs as well as the risk that the action may not succeed.

iii. Defendant perspective: for costs

[382] Arguments favouring costs, when looked at from the defendant's perspective, include:

- costs operate as a deterrent against the bringing of unreasonable claims;
- there should be some sanction in the event that the class proceeding is unsuccessful;
- the possibility that plaintiffs will have to pay the defendants' costs may operate as an inducement for plaintiffs to settle;
- defendants want to know that if they succeed their costs will be paid; that is, the considerations that entitle defendants to be paid their costs in ordinary actions apply in class actions; and

- where a successful defendant may be entitled to costs, the defendant may also apply for security for costs.[316]

iv. Defendant perspective: against costs

[383] An argument against costs, when looked at from the defendant's perspective, is:

- costs are of questionable use to defendants because courts rarely award costs to well-resourced defendants such as government or large corporations.

c. *Arguments for "no costs"*

i. Plaintiff perspective: for "no costs"

[384] One argument favouring "no costs", when looked at from the plaintiff's perspective, is:

- representative plaintiffs may be more willing to act if they know that they do not risk paying the defendants' costs and this promotes the access to justice

ii. Plaintiff perspective: against "no costs"

[385] Arguments against "no costs," when looked at from the plaintiff's perspective, include:

- "no costs" reduces the incentive for a defendant to settle;
- representative plaintiffs are denied an important resource at the certification stage;[317]

---

[316] *Sutherland* v. *Canadian Red Cross Society*, *supra* note 206.

[317] *Robertson* v. *Thomson Corp.*, [1999] O.J. No. 908:

> The plaintiff is an individual with a relatively small claim who sues on behalf of a large class of individuals... The defendants strenuously resisted certification in an attempt to effectively end the action. That strategy put the plaintiff to very considerable expense (not to mention the risk of a very substantial adverse costs award had the strategy been successful). While the defendant was certainly entitled to advance the arguments it did on the certification motion, I do not think it appropriate to require the plaintiff to carry the financial burden of the certification motion until the conclusion of the action, and then, only to be awarded if successful. If the goal of enhanced access to justice is to be met, some account must be taken in a case such as the present one of the financial burden of

(continued...)

- the representative plaintiff will not be entitled to recover their own costs should the claimants be successful which may be an impediment to bringing action, even in a strong case and, unless government funding is available to assist with ongoing disbursements, may deter class actions that do not seek monetary recovery; and
- well-heeled defendants can build up costs and overwhelm the representative plaintiff's financial resources.

iii. Defendant perspective: for "no costs"

[386] One argument favouring "no costs," when looked at from the defendant's perspective, is:

- no costs may be more advantageous to defendants than to plaintiffs – eliminating costs reduces the financial risk to defendants of opposing the claim all the way through, from certification through to disposition.

iv. Defendant perspective: against "no costs"

[387] Arguments against "no costs," when looked at from the defendant's perspective, include:

- plaintiffs may be more inclined to bring unworthy actions because they know that if they lose they will not have to pay costs – American experience demonstrates that a "no costs" rule makes it easy for plaintiff counsel to bring strike actions;
- the absence of costs may discourage defendants from defending a proceeding, even where they have a legitimate defence, because the costs of defending are greater than the cost of an early settlement; and
- a small number of plaintiffs may commence class proceedings rather than individual actions in order to take advantage of the "no costs" provisions.[318]

---

[317] (...continued)
carrying on litigation against a wealthy and determined opponent.

[318] Branch, *supra* note 77 at paras. 19.220 and 19.330, explains that this concern is not as great as it might first appear. First, these plaintiffs may not want to forfeit the possibility of recovering their own costs from the defendant if successful. Second, the class proceeding must otherwise satisfy the tests set out in the legislation. A court will recognize bare attempts to take improper advantage of the costs rule and refuse to certify on the basis that a class proceeding is not the preferable mechanism.

d. Public interest arguments

[388] Some public interest considerations relating to cost regimes are that:

- the degree of costs that may be awarded should recognize that there will be a monetary sanction for unsuccessful litigation on the one hand, but it should not be so onerous as to totally deter any such class actions; and
- the existence of a fund may not be a big deal if the prospective damages award is large because class counsel's law firm may be willing to carry them.

[389] Some public interest considerations relating to "no cost" regimes are:

- "no costs" avoids the necessity of establishing a class proceeding fund where, as in Alberta, asking the government for seed money to finance a fund is not likely to be acceptable to government; and
- even in a "no costs" regime, the court can still award costs if some abuse of process occurs.

e. Discussion

[390] *Costs*. Burdening the representative plaintiff with the obligation to pay the defendant's costs if the action is unsuccessful is likely to defeat one of the main objectives of class proceedings – to improve access to justice for potential plaintiffs. At the same time, the ability of the court to shift costs as litigation progresses is useful as a technique in case management which emphasizes economical litigation and accountability for every step taken. The case management of a class proceeding may be more effective if courts are free to use costs as a case management tool.

[391] ***Costs supplemented by a fund***. Costs in the context of class actions are normally coupled with the establishment of a fund as has been done in Ontario and Quebec. The viability of the costs approach may, in fact, be dependent upon the existence of a fund. Such a fund helps to defray the representative plaintiff's expenses in bringing the class action and cover costs ordered against the representative plaintiff if the class action is unsuccessful. But is it feasible to suggest the creation of a fund? The problem with this option is that in recent years

the Alberta government has been reluctant to come up with funds in related contexts, including civil enforcement.

[392] ***Possible costs variations***. The costs option could be combined with a modified version of ULCC Act section 37, giving the court more guidance in the exercise of its discretion in order to find a balance between awards of costs and the purposes of class proceedings. This could be achieved by combining the approach taken in the Ontario jurisprudence with the considerations that affect cost awards in Ontario or permit cost awards in British Columbia:

> In determining by whom, at what stage or stages of the proceedings and to what extent costs should be paid, a court shall consider:
>
> (a) the effect of an order for costs on the purposes of the Act [the courts in Ontario and B.C. have identified the purposes of access to justice, judicial economy, behaviour modification],
>
> (b) whether the class proceeding was a test case, raised a novel point of law or addressed an issue of significant public interest; and
>
> (c) whether
>
> (i) there has been vexatious, frivolous or abusive conduct on the part of any party,
>
> (ii) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
>
> (iii) there are circumstances that make it unjust to deprive the successful party of costs.

[393] The scale of costs could be altered for class actions as has been done in Quebec.[319] Yet another option would be to impose costs on plaintiff counsel rather than representative plaintiff. This could be fair where the plaintiff's lawyer has the largest vested interest in the outcome, is the one making the decisions about the proceeding or has chosen the representative plaintiff, as in a "strike action." On the other hand, it may be more important to create a situation in which counsel will act to bring class proceedings than to put a disincentive in counsel's way. Still another option would be to require class members to contribute to costs. However, there are good reasons why class members should not be liable for costs. Class members are not in charge of the proceedings, may not agree with the way the proceedings are being conducted and may not be willing or able to assume responsibility for costs which are out of their control.

---

[319] *Supra* notes 309 and 310 and accompanying text.

f. Conclusion

[394] It is difficult to choose between a costs regime and a "no costs" regime. Both approaches are working in the jurisdictions in which they have been introduced – class actions are being litigated in Quebec, Ontario and British Columbia. In both costs and "no costs" regimes, class counsel are financing some representative plaintiffs on the basis of contingency fee agreements that would see counsel reimbursed for out-of-pocket expenses and paid for their services from a share of the award in a successful action. Access to justice is taking place. All things considered, we prefer the "no costs" option. In our view, this option better balances the interests of both plaintiffs and defendants, especially in the absence of any fund established to assist plaintiffs. We recommend the adoption of the alternative provision in the ULCC Act.

RECOMMENDATION No. 22

(1) Unsuccessful parties to the class proceeding should not be liable to pay costs unless:

(a) there has been vexatious, frivolous or abusive conduct by a party,

(b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or

(c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

(2) Class members, other than the representative plaintiff, should not be liable for costs except with respect to the determination of their own individual claims.

O. Legal Fees and Disbursements Incurred in the Conduct of a Class Action

1. Why the issue arises

[395] Litigation has to be funded, whether by the client or by some other means. One means is pursuant to a contingent fee agreement. A contingent fee agreement is an agreement under which a lawyer agrees to make the payment of fees by the client contingent on the success of the action. In such an agreement, the lawyer may also agree to fund any disbursements that must be made in order to proceed with the litigation. The funding of a class action is likely to be more complex than

usual, as solicitor-client fee agreements are likely to affect the interests of class members as well as the representative plaintiff. For this reason, special arrangements should be considered.

2. Rule 42

[396] Rule 42 makes no special provision with respect to legal fees and disbursements. The general rules therefore apply. These rules were amended effective May 1, 2000.[320] The amended rules provide that the amount charged for legal services must be reasonable (rule 613). The charges are subject to taxation (rule 614). Fee agreements, including contingency fee agreements, are permitted (rules 615-617). A fee agreement may cover (rule 615):

> ... the amount and manner of payment of the whole or any part of past or future services, fees, charges or disbursements in respect of business done or to be done by the barrister and solicitor either by a gross sum or by commission or percentage or by salary or otherwise and either at the same or a greater or less rate, than the rate at which he would otherwise be entitled to be remunerated, subject to taxation.

Contingency fee agreements must be made in writing, signed by both the lawyer and client or their agents and contain certain information specified in the rules (rule 616(1) and (2)). The client's signature must be witnessed (rule 616(3)) and an affidavit of execution sworn. The agreement must be served on the client within 10 days of signing and the client has the right to terminate the agreement within five days from service (rule 616(4) and (5)). If the lawyer is entitled to taxable costs, the lawyer's share can be no higher than the percentage the lawyer can receive in legal fees from a judgment or settlement and the agreement must say so (rule 616(2)(f)(iv) and (6)). At the client's request, the agreement or any account rendered under it is subject to review by a taxing officer or, on further request, a judge of the Court of Queen's Bench, and every account rendered must so state (rule 616(7)). A contingency fee agreement filed with the court for this purpose is confidential (rule 618). On a review, the clerk or judge has power to approve the agreement, or vary, modify or disallow it, in which case compensation will be payable as it would have been if a contingency arrangement had not been made (rule 619(4)).

---

[320] Prior to May 1, 2000, as under the amended rules, solicitor and client costs had to be reasonable (rule 613) and were subject to taxation (rule 614). Contingency fee agreements were permitted but had to be filed with the clerk of the court within 15 days of execution. Agreements entered into before May 1, 2000 are excepted from several of the requirements of the amended rule, provided that they were filed in accordance with the former rule. Then, as now, agreements had to be made in writing. The filing was on a confidential basis. The client could request review of the agreement and the clerk or judge had power to approve the agreement, or vary, modify or disallow it, in which case compensation would be payable as it would have been if a contingency arrangement had not been made (rules 618 and 619).

3. Class proceedings precedents

[397] Canadian class proceedings regimes allow agreements respecting fees and disbursements between a solicitor and a representative plaintiff (ULCC Act, s. 38(1)).[321] An agreement must be in writing, state the terms under which fees and disbursements are to be paid, estimate the expected fee, and state how payment is to be made. Unlike under the existing Alberta Rules, in class proceedings regimes, court approval must be obtained for the agreement to be valid (ULCC Act, s. 38(2)). This is necessary to protect the interests of class members whose recovery will be reduced by the lawyer's fees and generally to prevent abuses of the system.[322] If the court does not approve the agreement, it may determine the amount owing itself, or direct how this determination is to be made (ULCC Act, s. 38(7)). The amounts payable under an enforceable agreement constitute a first charge on any settlement funds or monetary award recovered in the class action (ULCC Act, s. 38(6)). With leave of the court, the notice of certification may include "a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements" (ULCC Act, s. 19(7)).

[398] Contingency agreements are not ordinarily allowed in Ontario. Therefore, in section 33 of its Act, Ontario makes a special exception for a written agreement between a solicitor and representative party in a class action (ULCC Act, s. 38, note [3]). Allowing contingency fee arrangements marks a departure from the recommendations of the Ontario Law Reform Commission. That Commission

---

[321] Ont Act, *supra* note 5, s. 32, and BC Act, *supra* note 6, s. 38, make express provision in their statutes. Quebec's class action rules do not contain a detailed procedure for fee approval. However, Quebec does provide that the order of priority in relation to a sum obtained on behalf of the class is: (1) legal costs including the costs of notification; (2) the fees of the representative's counsel; and (3) the claims of the class members: Quebec Art. 1035 C.C.P.; Quebec *Rules of Practice* – Superior Court, Art. 66. The second stage of this determination gives the court the ability to assess and consider the purported fee. See Branch, *supra* note 77 at 7.160.

[322] E.g., in *Smith* v. *Canadian Tire Acceptance Ltd.* (1994), 118 D.L.R. (4th) 238 (Ont. Gen. Div.), aff'd (1995), 26 O.R. (3d) 95 (C.A.), leave to appeal to S.C.C. refused (1996), 29 O.R. (3d) xv (note) (S.C.C.), "two non-parties were planning to profit from the litigation without taking the risk of an adverse costs award by acting as representative parties themselves. As well, the persons being asked to 'invest' were being offered a return that was not a percentage return on their investment, but rather a proportional share in any eventual reward": ManLRC Report, *supra* note 8 at 81.

would have allowed agreements under which the class lawyer would be entitled to receive their fees and disbursements only in the event of success in the action. However, the Commission would not have allowed the agreement to specify the amount of the lawyer's remuneration or its method of calculation. A judge would have had the task of assessing the appropriate costs. In doing so, the judge would have been directed to rely on the criteria for the taxation of a solicitor's account, but in addition the judge would have been obliged to include an amount to compensate the lawyer "for accepting the risk of non-payment in undertaking the litigation on this basis."[323]

[399] The Canadian class proceedings precedents provide the court with little guidance as to the exercise of its discretion to approve fees. The Ontario Act states that the court may consider the manner in which counsel has conducted the litigation in determining the appropriate multiplier to apply to the base fee where the multiplier method (the American "Lindy Lodestar" form) is used.[324] The class actions literature indicates that the standard *Yule* v. *Saskatoon (City) (No. 4)*[325] factors should apply, but with special consideration paid to the risk assumed by plaintiff's counsel in accepting a class action retainer.[326] Various methods of calculating fees have been considered and upheld by courts in British Columbia and Ontario – multiplier fees, percentage fees, lump sums and an amount per class member.[327]

[400] The B.C. Court of Appeal gave detailed consideration to the principles that govern contingency fee arrangements in class actions in a judgment rendered on June 22, 2000 in the cases of *Endean* v. *Canadian Red Cross Society* and *Mitchell*

---

[323] OLRC Report, *supra* note 15, 63 at 715.

[324] Ont Act, *supra* note 5, s. 33(9).

[325] (1955), 17 W.W.R. 296 (Sask. C.A.). According to this judgment, the matters to be considered in arriving at a proper amount of a counsel's fee on the basis of a *quantum meruit* include the extent and character of the services rendered, the labour, time and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or the value of the property involved, the professional skill and experience called for, the character and standing in his profession of the counsel and the results achieved: *ibid.* at 299.

[326] See e.g., Branch, *supra* note 77 at para. 7.160.

[327] Branch, *ibid.*, and Eizenga, Peerless & Wright, *supra* note 28, give examples.

v. *Canadian Red Cross Society.*[328] In assessing whether the amount of the fee in question was reasonable the court considered a lengthy list of factors. These were:

- the extent and character of the services rendered;
- the labour, time and trouble involved;
- the character and importance of the litigation;
- the amount of money involved;
- the character and standing of counsel;
- the ability of the clients to pay;
- the results achieved;
- the risk of no recovery;
- the expectation of a larger fee than in a non-contingency case;
- the contribution of counsel to the result;
- the integrity of the legal profession; and
- public policy.

With respect to public policy, the court quoted statements asserting that whether or not class proceedings regimes will achieve their objectives "will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and bring the actions" and that "class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing."[329] The court observed that the objectives of class actions "include the improvement of access to the courts for those whose actions might have merit but who would not otherwise pursue them because the legal costs of proceeding are disproportionate to the amount of the individual claims." It went on to say that "Given the objective, the courts must ensure, first, that plaintiffs' lawyers who take on risky class actions on a contingent basis are adequately rewarded for their efforts and, second, that hindsight is not used unfairly in the assessment of the reasonableness of their fees."[330]

---

[328] [2000] B.C.J. No. 1254, 2000 BCSC 971; see also *Serwaczek* v. *Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386.

[329] *Endean*, *ibid.* at ¶ 87, quoting from Gary D. Watson, "Class Actions: Uncharted Procedural Issues."

4. Consultation and recommendations

[401] In CM9, we asked what, if any, provision should be made with respect to the payment of legal fees and disbursements in a class action. The persons consulted felt that the provisions in the ULCC Act were adequate. They supported the idea that the court should approve arrangements for legal fees and agreed that it would be reasonable to allow a representative plaintiff to include a request for contributions from class members in the notice of certification. (ULCC Act, s. 19(7)).

a. Main recommendation

[402] We generally concur with the view that the provisions in the ULCC Act should be adopted. However, we would make two alterations. The first alteration has to do with the timing of court approval of the agreement. The second alteration would permit representative parties to seek funding of their costs and disbursements from persons and organizations who are not class members.

b. Timing of court approval of a fee agreement

[403] The Ontario, British Columbia and ULCC Acts do not specify when class counsel ought to bring a contingent fee agreement between the class counsel and the representative plaintiff to court for approval. The cases vary. In *Anderson* v. *Wilson*[331] the court approved the retainer agreement prior to certification on an *ex parte* basis. Other courts have been reluctant to approve an agreement "until after the judgment is rendered on the common issues or the settlement concluded,"[332] so this is when the application for approval will normally take place. Even if the class counsel applies for approval of the general structure of the agreement prior to certification, final approval of the actual amount may have to await the end of the litigation. An example would be a case where counsel seeks a multiplier on their

---

[330] *Endean*, *ibid*. at ¶ 88.

[331] (1996), 18 O.T.C. 79 (Ont. Gen. Div.).

[332] See e.g., *Crown Bay Hotel Ltd. Partnership* v. *Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83, penultimate para. (Winkler J.).

total billable hours which cannot be determined until the common issues have been resolved.

[404] After reviewing the advantages and disadvantages of approval at each of these stages, the Manitoba Law Reform Commission recommended the addition of two provisions to section 35 of the ULCC Act. The first addition would require an application for approval of a fee arrangement to be brought prior to certification of the class proceeding. Approval prior to certification allows consideration of the element of risk as it exists at the front end of the litigation. The second addition would require an application to review a contingency fee after the common issues have been resolved to be brought before the judge who tried the common issues or the judge who approved the settlement agreement, whichever may be the case.

[405] We debated the question of the timing of court approval of a fee agreement and whether to specify when that approval should be sought. Before making our recommendation, we itemize some of the advantages and disadvantages of approval at or before certification or upon determination of the common issues or settlement.

i. Approval at or before certification

(a) Advantages

[406] Advantages of requiring approval of a fee agreement at or before certification include:

- application at an early stage allows the court to approve the general structure of the agreement; and

- class members are entitled to be notified about an agreement for fees and this may be important to their decision whether to opt out of (or into) the proceeding – for example, a percentage fee fixed in advance would give class members some ground to decide whether to opt out because the lawyers' fees are "too rich"[333] – but, unless the fee agreement has been approved in advance by the court, the notice of certification will not be able to include the required information about any agreements regarding fees and disbursements.[334]

---

[333] G. Watson, "Is the Price Still Right? Class Proceedings in Ontario" (unpublished paper presented at The Administration of Justice in Commercial Disputes Conference, Toronto, Ontario, 15-18 October 1997) at 26.

(b) Disadvantages

[407] Disadvantages of requiring approval of a fee agreement at or before certification include:

- the interests and concerns of class members are not likely to be before the court because usually only the representative plaintiff and class counsel are involved at this stage;
- "any estimate of the amount of time and effort involved in the case will be purely speculative, and the amount of any eventual award may be uncertain in the extreme," that is, the "court will be working largely in the dark;"[335]
- when a contingency fee is approved in advance ... the subsequent award of such a fee may simply be unfair – for example if the litigation is settled shortly after the fee is approved so that class counsel reaps a potentially huge fee for a very little expenditure of time or effort;[336]
- "class members find the multiplier fee incomprehensible and too uncertain to assist" the opt in / opt out decision;[337]
- it is unlikely that secrecy over the terms of the agreement could be maintained because the representative plaintiff is required to summarize the proposed fee in the notice of certification that goes to class members;
- even when a contingency fee agreement has been approved in advance, the court, relying on its inherent jurisdiction, can probably amend the terms of

---

[334] ManLRC Report, *supra* note 8 at 83.

[335] ManLRC Report, *supra* note 8 at 82.

[336] Watson, *supra* note 333. Unfairness could be avoided by having a "stepped" contingency fee agreement, where the percentages increase depending on the stage reached in the litigation.

[337] *Ibid.*

the agreement subsequently as occurred in *Harrington (Guardian ad litem of)* v. *Royal Inland Hospital*[338] (a non-class action case).[339]

ii. Approval upon determination of the common issue or settlement

(a) Advantages

[408] Advantages of requiring approval of a fee agreement upon determination of the common issue or settlement include:

- to "be fair to the class (and to be acceptable in our society) ... class counsel fees must bear a reasonable relationship to the success achieved, the time and work expended and the risk undertaken by class counsel";[340]

- only after the judgment is rendered on the common issues, or the settlement is concluded, can a court "be satisfied that it has all of the relevant factors before it necessary for approval of the fee arrangement"[341]

    - "[w]here a percentage fee is used, the court will determine a reasonable percentage having regard to the degree of risk undertaken by counsel, the degree of success in the proceeding, and the other criteria enunciated in *Serwaczek* v. *Medical Engineering Corp.*"[342] or

    - where a multiplier is used, the court must know how many hours have been put in; and

- approval at the conclusion of the litigation is consistent with the treatment of contingent fee arrangements under the Alberta Rules.

---

[338] (1995), 131 D.L.R. (4th) 15 (B.C.C.A.).

[339] Watson, *supra* note 333, cited in ManLRC Report, *supra* note 8 at 83.

[340] *Ibid.* at 12.

[341] *Crown Bay Hotel Ltd. Partnership* v. *Zurich Indemnity Co. of Canada*, *supra* note 332.

[342] *Ibid.*

(b) Disadvantages

[409] Disadvantages of requiring approval of a fee agreement upon determination of the common issue or settlement include:

- class members will not have the opportunity to take fee considerations into account in deciding whether to opt out of (or into) the proceeding;
- the inability to obtain approval for fee agreements early in a proceeding "can create a quandary for class counsel who are being asked to invest time and resources without any certainty or guidance with respect to the potential reward in the event of success;"[343]
- after a successful outcome, the court "may unconsciously underestimate the degree of risk undertaken by the successful counsel, and as a result may set compensation inappropriately low;"[344] and
- counsel may be unwilling to assume the risks of the litigation without more assurance of a good fee, thereby impeding access to justice for potential claimants who cannot find another way to finance the litigation.

iii. Recommendation

[410] We recommend the adoption of the provisions in the ULCC Act, modified in accordance with the recommendations made by the Manitoba Law Reform Commission, which concluded that fee agreements ought to be submitted for approval prior to certification and that the court should also be able to revisit the agreement at the conclusion of the proceeding to ensure that it is fair and reasonable to class members as well as class counsel. There is a question whether the court scrutiny after the common issues have been resolved should be on request, as it would be under the existing Alberta law, or mandatory. We would require court scrutiny of both the initial approval and later review. With respect to the later review, we recommend that notice regarding the actual fees calculated should be given with the notice of resolution of the common issues. The notice should set out the right of the class member to object, and say when the application

---

[343] Eizenga, Peerless & Wright, *supra* note 28 at § 13.6.

[344] ManLRC Report, *supra* note 8 at 82.

will be heard and what the class member can do to be heard. Recommendation 9(a)(ii) includes a provision to this effect.

c. Contributions to expenses

[411] Historically, the law of "maintenance" has prevented third parties from contributing to the financing of litigation. "Maintenance" has been defined as "the officious assistance of a third party, either by disbursing money or otherwise giving assistance to either party to a suit in which he himself has no legal interest."[345] It was actionable at common law.[346] Class proceedings test the limits of this law. With leave of the court, solicitation for contributions from class members is permitted under the provisions themselves and there are instances where Ontario courts have allowed investors with no legal interest in a class proceeding to provide funding for costs and disbursements in the proceeding.[347] In recommending that outside funding be permitted in class proceedings, the Manitoba Law Reform Commission observed that, in many cases, "there may be organizations that do not wish to act as representative parties, but would be prepared to provide funding to support a class proceeding that they see as being in the interests of their members."[348]

[412] We recommend the inclusion of a provision specifying that representative plaintiffs may seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class.

RECOMMENDATION No. 23

(1) Agreements respecting fees and disbursements made by the representative plaintiff and the class counsel should be required to be approved by the court. This approval

---

[345] ManLRC Report, *supra* note 8 at 80.

[346] *Ibid.*

[347] See e.g., *Nantais* v. *Telectronics (Canada) Ltd.*, unreported (September 14, 1995), Windsor 95-GD-31789 (Ont. Gen. Div.).

[348] *Ibid.* at 81. See also ALRC Report, *supra* note 19 at 129, cited in ManLRC Report, *supra* note 8 at 81: The Australian Law Reform Commission would abolish the law of maintenance and permit third parties to fund grouped proceedings as long as this is not done in consideration of a share of the proceeds.

should occur prior to, or simultaneously with, certification of the proceeding.

(2) After the common issues have been resolved, the representative plaintiff must seek review of the agreement to ensure that the remuneration under the agreement is fair and reasonable in all of the circumstances. The review should be made by the judge who presided over the trial of the common issues or approved the settlement agreement, whichever is the case.

(3) Fees and disbursements payable under an agreement should form a first charge on any monetary award in a class proceeding.

(4) Where the court determines that the agreement ought not to be followed, it should be authorized to amend the terms of the agreement or

  (a) determine the amount owing to the solicitor in respect of fees and disbursements,

  (b) direct an inquiry, assessment or accounting under the Alberta Rules of Court to determine the amount owing, or

  (c) direct that the amount owing be determined in any other manner.

(5) Representative parties should be able to seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class.

P. Limitation Periods

1. Why the issue arises

[413] The bringing of an action on a claim in an ordinary action stops the limitation period from running against the plaintiff. It is necessary to know whether or not the bringing of a class action stops the limitation period from running against class members who, technically, have not brought the class action, but whose claims are being asserted in the class action.

2. Rule 42

[414] Here again, rule 42 is silent so the general law applies. The representative plaintiff will have protected themself from the expiration of a limitation period running against them by commencing the action. However, individual class members will not be protected unless they have taken the precaution of commencing their own individual actions. Therefore, later developments in the case may give rise to limitation problems for individual class members, for example, if the representative action is disallowed[349] or the definition of the class is changed so as to exclude them.

3. Class proceedings precedents

[415] Canadian class proceedings regimes suspend the running of limitation periods where it is reasonable for a person to assume that they are a member of a class action (ULCC Act, s. 39). In Ontario, the suspension runs from the commencement of the proceeding in every case. In British Columbia and under the ULCC and ManLRC recommendations, it runs from the commencement of the proceeding, but only in cases where the proceeding is certified. That is because, by definition, a proceeding is not a "class proceeding" until it has been certified (ULCC Act, s. 1). This means that potential class members must initiate individual actions if the limitation period is at risk of expiring prior to the certification decision (ULCC Act, ss. 1 and 39, read together).

[416] The limitation period resumes when: the class member opts out; a court ruling excludes a person from class membership; a certification order amendment excludes a class member; a court decertifies the class action; the class action is dismissed, discontinued or abandoned, or settled with court approval; or after expiration of the time for appeal or disposition on appeal (ULCC Act, s. 39(2) and (3)).

4. Consultation and recommendations

[417] In CM9, we asked whether limitation periods should be suspended for class members during the conduct of a class action. The consultation supported the view that limitation periods should be suspended from the commencement of the proceeding and that the suspension should include the period of time between

---

[349] *Supra* note 23; see also *supra* note 41 and accompanying text.

commencement and the certification hearing, regardless of whether certification is granted or refused. Without this coverage, class members who are at risk of a limitation period expiring between filing of the class action and the determination of the certification application would have to commence individual actions to guard against the possibility that certification will be denied. This would detract from the efficiency of a class proceeding.

[418] We recommend modifications to the ULCC provision to reflect this change.

RECOMMENDATION No. 24

(1) Limitation periods should be suspended as against class members on the commencement of a class proceeding, whether or not the proceeding is ultimately certified.

(2) Limitation periods should resume running against all class members when:
  (a) the proceeding is discontinued before the hearing of an application for certification,
  (b) the application for certification is denied,
  (c) a decertification order is made,
  (d) the class proceeding is dismissed without an adjudication on the merits,
  (e) the class proceeding is discontinued with the approval of the court, or
  (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(3) Limitation periods should resume running against a particular class member when:
  (a) the member opts out of the class proceeding, or
  (b) an amendment made to the certification order or another ruling by the court has the effect of excluding the class member from the class proceeding or from being considered to have ever been a class member.

(4) Where a right of appeal exists, the limitation period should resume running after the appeal period has expired or, if an appeal has been taken, after the appeal has been finally disposed of.

Q. Role of Representative Plaintiff's Counsel

1. Why the issue arises

[419] In jurisdictions that have enacted class proceedings legislation, the representative plaintiff's counsel bears a number of duties that do not arise in traditional litigation. The implications for lawyers of introducing such legislation should be considered.

2. Rule 42

[420] Rule 42 is silent about the duties of counsel acting for a representative party. The duties, if such exist, must be found elsewhere in law or policy.

3. Class proceedings precedents

[421] In 1993, following the enactment of the Ontario class proceedings legislation, the Law Society of Upper Canada issued a document that attributed to counsel a professional duty to identify the potential for a class proceeding.[350]

[422] It would be advisable for counsel to consider the answers to a number of questions before agreeing to commence a class proceeding:[351]

(1) Is the client appropriate and willing to act as representative plaintiff for the class?

(2) Is the client aware of the time and financial obligations required in becoming the representative plaintiff (which may include extensive and possibly personal cross-examination by the defendant)?

(3) Does the class as a whole exist and what is the scope of that class?

(4) Is it in the client's best interests to pursue the claim on an individual basis or through a class proceeding?

(5) How will costs be handled in a class action, and can the client carry their own disbursements?

(6) Is the client prepared for a proceeding that will likely be longer than individual litigation and more difficult to extricate themself from?

---

[350] Law Society of Upper Canada, *Class Proceedings: Guidelines for Practitioners* (January 1993).

[351] Sullivan, *supra* note 63 at 18-20.

(7) Does the client understand the procedure for determining whether a class action is appropriate and the possibility of a significant loss of privacy?

(8) Can the law firm afford to carry the litigation?

(9) Is counsel sufficiently experienced and competent to take the class proceeding?

(10) Is the client aware that a class proceeding may already have been started concerning the same issues and class?

4. Consultation and recommendations

[423] In CM9, we asked about the implications of class proceedings for lawyers and how the implications should be dealt with. The persons consulted acknowledged that class proceedings will impose new and enhanced duties upon counsel to ensure that the proceedings are run properly, that the representative plaintiff is appropriate and that the interests of class members are served. These duties should not be encoded in rules or the legislation, but a handbook or manual for counsel and the representative plaintiff would be useful. One respondent commented that in the case of mass tort litigation only a small proportion of Alberta lawyers are likely to have exposure to the obligations of plaintiff's counsel because this is a uniquely specialized field.

[424] In cases of personal victimization, such as the wrongful sterilization and residential schools cases, the opportunity for class members to tell their story to a person in authority may be as important as monetary relief. The need to be 'heard' may remain even after a successful judgement or settlement. Class counsel should be sensitive to the different needs and justice sought by class members in such actions. Special procedures and assistance may have to be introduced. We anticipate this will be a specialized area of class actions and may require the development of victim impact statements (as used in the criminal law area), mediation services or the use of other techniques in concert with class litigation.

[425] We recommend that the Law Society of Alberta adopt the approach taken by the Law Society of Upper Canada and publish a document that describes the role and duties of class counsel in class proceedings.

RECOMMENDATION No. 25
The Law Society of Alberta should document the role and duties of class counsel in class proceedings.

R. Defendant Class Proceedings

[426] Most discussions of class proceedings focus on, and most actual class proceedings involve, situations where many persons have the same or similar claims against the same defendant or defendants. The class in the class proceeding consists of plaintiffs. Situations also arise, however, where a plaintiff or group of plaintiffs assert rights that raise common issues against a large number of persons. Proceedings in which one or more plaintiffs are asserting rights against persons who are treated as a class are often referred to as "defendant class actions" (or "proceedings").[352] We adopt that terminology in this section of the report. It should be kept in mind that the term is used to denote the composition of the class – defendants – rather than to denote the person or persons on whose application the proceeding is made a class proceeding.[353]

1. Why the issues arises

[427] As just stated, two or more defendants may be in the same or a similar position in relation to common issues raised against them. The question arises whether it should be possible for such defendants to form (or be required to form) a class and defend claims brought against them through a representative defendant and, if so, on what terms and with what consequences.

2. Rule 42

[428] Rule 42 expressly allows the court to authorize one or more defendants (representative defendants) to defend on behalf of and for the benefit of a class of defendants. As the reader will recollect, it says:

> Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

---

[352] See e.g., Barry M. Wolfson, "Defendant Class Actions" (1977) 38 Ohio St. L. J. 457.

[353] We make this point because the term "defendant class proceeding" or "defendant's class proceeding" is sometimes used to refer to the situation where a defendant applies for certification of a plaintiff class. That is not the sense in which the phrase is used here.

[429] In *National Supply Company* v. *Greenbank*[354] – the only reported Alberta defendant class action case we found – the plaintiff had not been paid for materials it supplied to a firm that was drilling for oil. The firm had financed the drilling venture by issuing royalty trust certificates. When the firm encountered financial difficulties and was unable to complete the well, the royalty trust certificate holders (hereinafter, "beneficiaries"), of whom there were about 115, formed a committee to complete the well. The substantive issue in the action was whether the plaintiff or the beneficiaries had a superior right to a fund that had been obtained as a result of a claim by the beneficiaries' committee against the estate of one of the defunct firm's principals. The plaintiff sought an order naming Greenbank, a member of the beneficiaries' committee, as a representative defendant authorized to defend the action on behalf of all the beneficiaries. Greenbank, having no desire to be a representative defendant, strenuously resisted the plaintiff's efforts to accord him this honour. The majority decision held that this was an appropriate case in which to authorize – or more accurately, to require – one person to defend the action on behalf of all persons with a common interest in the subject of an action.[355] We return to this case later, in connection with our discussion of the policy considerations relating to defendant class actions.

3. Class proceedings precedents

[430] The class proceedings legislation, or recommendation for it, in most Canadian jurisdictions is silent about defendant class actions. Ontario stands alone

---

[354] [1941] 3 W.W.R. 711 (Alta S.C. (A.D.)).

[355] The motions judge and a minority of the Appellate Division did not think this was an appropriate case for an action against an unwilling representative defendant. Unlike most class actions or representative proceedings, this one actually enjoyed a full and reported life after being allowed to proceed on a representative basis. The plaintiffs obtained the judgment they were looking for, and this judgment was ultimately affirmed by the Supreme Court of Canada: [1944] S.C.R. 59. The fact that this was an action against a representative defendant merited nothing more than a passing mention in the Supreme Court's judgment.

in providing that the court may certify a defendant class.[356] The Ontario provision reads:[357]

> Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

[431] In *Chippewas of Sarnia Band* v. *Canada*[358] – the only reported case employing this section to date – the plaintiff Band was asserting claims against about four square miles of urban land. The foundation of the claim, in brief, was that a purported surrender of reserve land in the 1800s was void, so that alleged interests in the land which depended on the validity of the surrender were subject to the band's continuing rights in the land. There were about 2,200 persons with such alleged interests, but all of their claims could be traced to a single grant (following the purported surrender of reserve land) in 1853. The Band was successful in its application to certify its action as a class proceeding with different defendants being designated to represent different classes of adverse claimants.[359]

---

[356] The OLRC Report, *supra* note 15, 63, did not deal in detail with or make recommendations about defendant class proceedings. It noted that the issues raised by such proceedings were discrete and substantial enough to merit separate, detailed study that was beyond the scope of the report: OLRC 1982, vol. 1 at 3, 43-44. The OLRC's perception that the subject required separate study did not deter the Ont Advisory Committee from recommending a provision dealing with defendant class proceedings: Ont Advisory Committee Report, *supra* note 16 at 29-30. The Committee's proposed provision dealt both with applications by a defendant to certify a plaintiff class and applications to appoint a defendant to defend on behalf of a class. The Committee's discussion of this provision consists of the following statement:

> The Committee anticipates the need for defendant class proceedings and developed this provision to ensure that such proceedings were available and mirrored plaintiff class proceedings.

Insofar as the Committee's recommended provision dealt with proceedings against a defendant class, it is implemented by the Ont Act, *supra* note 5, s. 4.

[357] Ont Act, *ibid*.

[358] (1996), 29 O.R. (3d) 549, [1996] O.J. No. 2475; supplementary reasons designating class representatives at [1996] O.J. No. 2820. The substantive issues in the case have been addressed in a decision on summary judgment applications by various parties: [1999] O.J. No. 1406. This decision is currently the subject of various appeals and cross-appeals to the Ontario Court of Appeal: see [2000] O.J. No. 138.

[359] When we say "adverse claimants" we mean adverse to the Band's claim, rather than adverse to each other's claim.

[432] The ULCC Discussion Paper[360] gives reasons why defendant class proceedings are not included in the British Columbia Act and are not recommended by the ULCC.[361] We address these reasons under heading R.4.b.

4. Consultation and recommendations

[433] In CM9 we asked whether any changes should be made with respect to defendant class actions. Among the persons consulted, the only issue that attracted comment was whether members of a defendant class should be able to opt out of the proceeding. We consider this issue in connection with our examination of the policy arguments and other considerations relating to the desirability and content of defendant class actions provisions, following which we make our recommendations.

a. Reasons supporting defendant class actions

[434] The main reasons supporting defendant class actions coincide with the reasons supporting plaintiff class actions. Proceeding against a defendant class rather than against many individual defendants can save "enormous labour and expense"[362] for plaintiffs, defendants and the courts. By proceeding against a defendant class in one action instead of against defendants individually in different actions, inconsistent or varying adjudications or re-litigation of the same issues can be avoided. Plaintiffs may gain access to justice that they could not otherwise afford. For example, it may make it possible for a plaintiff to obtain relief for relatively small claims against a number of defendants in situations where it would not have been economically viable to bring an action against each defendant individually. The fact that plaintiffs will be able to bring actions against defendants as a class may deter wrongdoing by potential defendants.

---

[360] ULCC DP, *supra* note 237. Rogers prepared the discussion paper for the ULCC as a representative of the BC Attorney-General.

[361] On its face, the passage in the ULCC DP, *ibid.*, might be taken as the expression of a conclusion that plaintiffs should not be permitted to bring actions against defendant classes. However, since B.C. still has its equivalent of our rule 42 (B.C. rule 5(11)), a plaintiff in that province might still bring a representative action under the rule.

[362] *Irish Shipping*, *infra* note 363 at 367.

[435] These justifications are amply illustrated in *Irish Shipping* v. *Commercial Union Assurance*,[363] a case decided relatively recently by England's Court of Appeal under a rule comparable to Alberta's rule 42. In *Irish Shipping*, a shipowner was entitled to an indemnity from the ship's charterer for certain cargo claims that the shipowner had been required to pay. As the charterer was bankrupt, the shipowner was seeking to recover from the charterer's liability insurers. As was customary in such matters, the total insurance coverage under the insurance policy was provided by a multitude of different insurers – 77 to be precise – each of whom had subscribed for a share of the total risk. The substantive issue was whether the shipowner had a direct cause of action against the charterer's insurers. The procedural issue was whether the shipowner could proceed by way of representative action against the lead underwriter or must name and serve each insurer individually.

[436] The argument for allowing the action to proceed on a representative basis was not that it would otherwise be impossible "to come at justice,"[364] since all the defendants could have been named and served (some *ex juris*). What was at stake was framed in the following terms:[365]

> So the practical question is whether it is necessary for the shipowners to go to the enormous labour and expense of joining all the insurers in one English action, or whether they may take advantage of the simplified procedure afforded by Ord 15, r 12.

The court held that it was unnecessary for the shipowner to be put to the "enormous labour and expense" of joining all 77 insurers in one action. In reaching its decision in *Irish Shipping*, the court rejected certain arguments as to why the shipowner could not, as a matter of law, proceed by way of representative action. We consider these arguments when discussing objections to defendant class proceedings under heading R.4.b.

[437] What is most notable about *Irish Shipping* for our purposes is the overall approach that the judges took in deciding whether the plaintiff could bring a

---

[363] [1989] 3 All E.R. 853 (C.A.).

[364] These are the words of Lord Macnaughten in *Duke of Bedford* v. *Ellis*, quoted *supra* note 32.

[365] *Irish Shipping*, *supra* note 363 at 860-61.

representative action. In brief, their approach emphasized practicality and convenience over theory and classification:[366]

> It will be seen that there is nothing in the wording of the rule itself which would restrict the wide ambit in which the rule should operate, in line with the old Chancery practice; but there are now built-in safeguards to protect a member of the class who may have particular defences or may be able to distance himself from the class in other respects. This accords with the concept, as I see it of the old rule, namely a broad rule of procedural convenience to be exercised with a wide but carefully used discretion. Apart from a deviation for a short period of time after the passing of the 1873 Act . . . the courts have reverted to a generous interpretation of the rule . . . in my judgment, the problem is not the width of the operation of the rule but how it shall be applied in the particular circumstances of each case.

We believe that this passage aptly describes the potential usefulness of a representative action and that, nowadays, Alberta courts would take a similar approach in deciding whether an action against a defendant class is appropriate under rule 42.

b. Objections to defendant class actions

i. Defendant commonality

[438] Defendants in the *Irish Shipping* case made various arguments to the effect that the shipowner could not, as a matter of law, proceed by way of representative action because the position of the defendants was not sufficiently similar. The arguments parallel arguments that have been effective to restrict the application of the historical representative action rule (Alberta rule 42 and its equivalents) where a plaintiff seeks to represent a class. Three such arguments were:

- that a representative action could not be used to recover a debt or damages from defendants who were severally liable under a contract;[367]

---

[366] *Ibid.* at 873-74. The reference to "built-in safeguards" refers to safeguards that were added to the English rule but which are not in rule 42. Essentially, they provide that, although a judgment is binding against unnamed members of the defendant class, it may only be enforced against them with leave of the court, and that when such leave is sought, the class member "may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability." Staughton, L.J. observed, at 861, that in such circumstances the court might well have inherent jurisdiction to set aside a judgment as against the particular class member.

[367] *Ibid.* at 864, 868.

- that a representative action could not be maintained against defendants whose liability, if any, arose under separate contracts;[368] and

- that a representative action was only appropriate if all of the defendants were on exactly the same footing, so far as their potential liability to the plaintiff and possible defences were concerned.[369]

The court ultimately rejected each of these arguments on the facts in that case, preferring instead to apply its overall approach emphasizing practicality and convenience over theory and classification. As we have just stated, this is the approach that we believe Alberta courts would follow today.

ii. Relief claimed

[439] The action in the *Greenbank* case was essentially a dispute over specific property in which a large number of persons, the beneficiaries, had a common interest adverse to the plaintiff's asserted interest.[370] The plaintiff was not seeking any type of personal monetary relief against the defendants in the representative proceedings – an adverse judgment would affect the represented persons only to the extent of their interest in the fund. Indeed, the Appellate Division's formal order stipulated that "no judgment shall be given under which recovery may be had personally against the Defendant, W.J. Greenbank, or against any of the persons interested in the said Trust Fund."[371]

---

[368] *Ibid.* at 864-65. It was emphasized that, although there were twelve separate contracts (the 77 insurers were in a smaller number of pools), "For all practical purposes this is one claim on one contract:" *ibid.*, at 865. Emphasis was also placed on the fact that there was a "leading underwriter clause" the effect of which was to create "a contractual obligation, undertaken by each individual insurer, that it will accept, follow and be bound by decisions, including the settlement of claims or 'contestations' (which I take to mean the rejection of claims in whole or in part) by the leading underwriter and accept liability for its proportionate share of 'all decisions taken against the Leading Company' (which I take to mean, or to include, judicial decisions):" *ibid.*, at 867. See also at 877-78.

[369] *Ibid.* at 861-62, 865, 868. The judgments emphasize that, in considering whether a representation order is appropriate, the court should be more concerned with the practical likelihood that the representative's interests will be concurrent with the represented defendants than with the theoretical possibility of conflicts: *ibid.*, at 861-62.

[370] *Greenbank*, *supra* note 354 at 714, 720-21.

[371] This is an extract from the App. Div. formal order, as set out in the judgment of the S.C.C. on the merits: [1944] S.C.R. 59, at 66.

[440] It seems likely that if the plaintiff had sought such relief, it would have been denied, on the basis that it was an inappropriate form of relief to be sought through representative proceedings.[372] All members of the court seem to have accepted an earlier decision from England, that of the Court of Appeal in *Walker* v. *Sur*,[373] as authority for the proposition that rule 42 does not permit a plaintiff to seek personal monetary judgments against persons who are not actually named and duly served as defendants. In the more recent *Irish Shipping* case, the Court of Appeal permitted a plaintiff to seek personal monetary awards against the members of a defendant class under England's equivalent of rule 42.[374] More than likely, this would be the authority an Alberta court would consider today.

iii. Selection of representative defendant

[441] One of the reasons given in the ULCC discussion paper for rejecting defendant class actions was that an unwilling representative defendant would not adequately represent the interests of defendant class members:[375]

> A final issue involves the selection of the representative defendant. While a representative plaintiff is self-selected, a party is unlikely to volunteer to act as a representative defendant and take on the burdens and risks of that role. This means a representative would have to be selected by the court or the plaintiff. An unwilling representative defendant could choose to inadequately represent the interests of the class in order to disqualify itself.

[442] The first step in responding to this argument is to note that the court must be convinced that the plaintiff has selected an appropriate representative defendant or defendants.[376] The interests of the proposed representative defendant or

---

[372] After observing that plaintiff's counsel made it clear that he was seeking representation only with respect to the claim against the fund, Ewing, J.A., who wrote the principal majority judgment, continued, "Grave doubts might well arise as to the right to representation in respect to claims other than those upon the trust fund, but as these are not in issue here they need not be dealt with:" *ibid.*, at 723. This is the most "positive" statement to be found in any of the judgments about the prospects of a representative action seeking some form of monetary award.

[373] [1914] 2 K.B. 930.

[374] RSC Ord 15, r. 12. The English rule had been expanded somewhat over the years, but the core of the rule was still very similar to Alberta rule 42.

[375] ULCC DP, *supra* 237, Part D.17, at 36 (exact pagination of downloaded document may vary).

[376] This requirement emerges from all three of the cases discussed above: *Greenbank*, *supra* note 354, *Irish Shipping*, *supra* note 363 and *Chippewas*, *supra* note 358.

defendants must be aligned with those of other class members on the common issues and there must be some assurance that the representative defendants have a sufficient stake in the outcome and adequate resources to ensure that they will adequately represent the interests of the defendant class (or subclass).[377] For example, in *Greenbank*, the court determined that the proposed representative defendant, having been a principal member of the committee appointed by the beneficiaries to salvage the drilling operation, was a particularly appropriate person to represent the interests of the trust holders:[378]

> Greenbank's defence is the defence of every other unit holder. He is peculiarly fitted by the office which he has filled and by the information which he must have acquired to represent his fellow unit holders.

[443] If the selected representative defendants meet the foregoing criteria, their reluctance to serve in that capacity will not prevent them from carrying the burden. In this context, self-interest can be a wonderful incentive to do "the right thing:"[379]

> Simply because none of the defendant class members may have any *desire* to endure the expenses of defending a big suit on behalf of the entire class, however, it does not follow that none of them has any *motive* to do so. The rationale for allowing the few to represent the many is grounded not on any supposed concern that representatives have for the interests of other class members, but upon the representatives' self-interests. If the interests of the representatives substantially coincide with the interests of absent class members, the representatives automatically protect the others to the limit of their ability by advancing their own interests.

---

[377] As Wolfson, *supra* note 352, points out, quite apart from any scrutiny of the proposed representative defendants by the court at the certification stage, the plaintiff has an interest in ensuring that the representative defendant will adequately represent the defendant class. If not, any judgment that is obtained might not be binding on unnamed members of the defendant class: Wolfson at 461-62, 477-79. In *Commissioners of Sewers* v. *Gellatly* (1876), 3 Ch.D. 610, at 615-16, Jessel M.R. emphasized the adequacy of representation as the reason why unnamed (and unserved) members of the defendant class are bound by an adverse judgment:

> . . . the Court being satisfied that the parties were fairly represented before it, and that the matter was fairly contested, made a final decision of the right, and everybody interested, although not actually present, was bound by that decision, because he was present by representation. . . But if Mr. Gellatly [i.e., a class member] could shew fraud or collusion, or anything of that sort, or shew that the Court was cheated into believing that the case was fairly fought or fairly represented, when in point of fact it was not, then he was entitled to the same benefit of such a defence as anybody else in a similar case.

Jessel M.R. made this observation during the course of argument but adopted it in his reasons for judgment.

[378] *Greenbank*, *supra* note 354 at 721.

[379] Wolfson, *supra* note 352 at 482-83.

The point is also well illustrated by *Greenbank*. As previously noted, although Greenbank was a reluctant champion of the defendant royalty trust beneficiaries' cause, he ultimately contested the merits of the plaintiff's case all the way to the Supreme Court of Canada.

[444] If the proposed representative defendant is not wholly suitable, corrective measures may be taken. At the early stage of the action when the Appellate Division was asked to uphold the appointment of the representative defendant in *Greenbank*, it appeared that the proposed representative defendant's interests were perfectly aligned with the interests of all beneficiaries. However, acknowledging the possibility that things might not to be quite as they appeared, the majority observed that one or more beneficiaries could later "apply to have an additional person or persons appointed as a further representative of any class and added as a defendant if for any reason the defendant Greenbank be considered by him or them as not qualified to represent all the certificate holders."[380] In *Irish Shipping*, the English Court of Appeal emphasized that any unnamed defendant who was not content to leave their defence in the hands of the representative defendant could apply to be added as a named defendant.[381] This approach is similar to that of the majority of the Appellate Division in *Greenbank*, where the possibility of appointing additional representative defendants was contemplated.

iv. Opting out

[445] Rule 42 does not give potential class members an automatic right to opt out of a class proceeding. The Ontario class proceedings legislation does. As stated previously, on consultation on CM9, the issue whether or not defendant class members should have the right to opt out of the class proceeding was the subject of opposing views. On one hand, we were told that "a judgment ought not be foisted on defendants" and that "opting out provisions should apply to defendants as well as to plaintiffs."[382] On the other hand, our project committee advisors were not entirely convinced that there would be any point to providing for defendant class proceedings if class members could opt out.

---

[380] *Greenbank, supra* note 354 at 714; see also at 715.

[381] *Irish Shipping, supra* note 363 at 862.

[382] Law Society Civil Practice Advisory Committee submission.

[446] One objection to providing for defendant class proceedings is set out in the ULCC discussion paper. The objection is that defendant class proceedings would be pointless because defendants would opt out, thereby frustrating the action:

> Unless special rules were inserted denying them the right to opt out, in many cases defendant class members would be likely to opt out and force the plaintiff to bear the cost of bringing individual actions against them.

[447] To this objection, we respond that even if this were true, this does not seem like a cogent reason not to make the procedure available. Even if defendants are given an unfettered right to opt out of an action against a defendant class,[383] plaintiffs could decide for themselves whether to commence such an action and to run the risk of mass opting out.

[448] The risk of widespread opting out by members of the defendant class was considered in *Chippewas of Sarnia Band* v. *Canada*:[384]

> They [the defendants] also point out that members of the defendant class may opt out of the proceedings following the certification thereby defeating the intent of this motion ...

After concluding that the Ontario Act, with its detailed procedural provisions, seemed to provide a better framework than the skeletal rule 12.07, the judgment came back to the defendants' point that widespread opting out could defeat the purpose of the class proceedings:[385]

> I would say, however, that the issuance of a rule 12.07 representation order may be revisited should opting out be so extensive that a supplementary representative structure is called for in the interests of justice.

We understand that the need to revisit the possibility of a representation order did not arise because, in fact, no one chose to opt out of the class proceeding.

[449] Why wouldn't unnamed members of a defendant class automatically choose to opt out, if given that option? One reason is that it may be obvious in the

---

[383] Whether defendants should be given such a right is considered below.

[384] *Chippewas*, *supra* note 358 at 566 (O.R.).

[385] *Ibid.* at 568. This passage highlights a theoretically important point of distinction between an action against a defendant class under Ontario's equivalent of rule 42 and an action under the Ont Act, *supra* note 5. It has never been suggested that represented defendants might simply opt out of an action under the rule, while the Ont Act, *ibid.*, gives defendants the same right to opt out of a class proceeding as is given to plaintiffs. Whether this degree of parallelism is appropriate is considered below (heading R.4.d.iv.).

circumstances of a particular case (e.g., because of the value of the claims against any given defendant) that any member of the defendant class who opts out is likely to find themselves a named defendant either in the class action or in a separate action. In such cases, all that opting out might accomplish would be to deprive the person opting out of the benefit of free legal representation.[386] Later (under heading R.4.d.iv), for reasons stated there, we recommend that defendant class members be prohibited from opting out and provide other solutions to meet concerns about adequate representation.

v. Binding effect

[450] Another reason given in the ULC discussion paper for not providing for defendant class proceedings has to do with the question whether class proceedings legislation could properly allow a court to issue judgments that would be binding upon "absent defendant class members" (i.e., non-party class members) for "due process" reasons:[387]

> Another issue arises with respect to the binding effect of a class action judgment or settlement on a defendant class member. While the legislature has the right to terminate causes of action (the effect of a binding judgment on plaintiff class members), its right to subject absent defendant class members to the coercive power of the court may raise due process problems. ...

[451] To this concern, we respond that it has long been accepted that a judgment against a defendant class in a representative action under rule 42 (or its equivalent in other jurisdictions) would be binding against unnamed class members, as long as their interests had been adequately advanced by the representative defendant or defendants.[388] In other words, "due process" has not been an obstacle.

[452] Defendants in the *Irish Shipping* case argued that a representative action was inappropriate where some of the unnamed defendants were out of the jurisdiction.[389] The court rejected this argument. Here again, considerations of practicality and convenience prevailed. On our part, we see no reason to

---

[386] See Wolfson, *supra* note 352 at 495-96.

[387] ULCC DP, *supra* note 237, Part D.17, at 36.

[388] See *Commissioners of Sewers of the City of London* v. *Gellatly*, *supra* note 377 at 615-16.

[389] *Irish Shipping*, *supra* note 363 at 865, 874-75.

distinguish a non-resident defendant class member from a non-resident defendant who may be sued in an ordinary action (for example, where the property forming the subject matter of the dispute is located in Alberta).

vi. Limitation periods

[453] In its discussion paper, the ULCC contends that the suspension of the running of limitation periods pending the hearing of an application to certify an action against a defendant class could lead to unfairness:[390]

> A third issue arising in defendant class actions involves the running of limitation periods. In plaintiff class actions, limitation periods are suspended for all class members when a certification application is brought. Applying this rule to defendants could result in unfairness in defendant class actions. Where certification is denied, members of a defendant class could be sued after the expiration of the original limitation period, even though they may not have had notice of the class action.

[454] We are not convinced that this could properly be characterized as an unfair result. Although the suspension of a limitation period during the pendency of a certification hearing might work to a defendant's disadvantage, a disadvantageous result is not the same thing as an unfair result. Meeting the overall goals of a class proceeding requires that other interests be balanced with those of potential defendants. Below (heading R.4.d.vi), we recommend that the limitation period be suspended only from the commencement of the action until the certification decision. If adopted, our recommendation will save a plaintiff applying for certification from the necessity of commencing separate proceedings against potential defendant class members before any individual limitation periods expire. In this way, it would contribute to judicial economy for the plaintiff and the court system. We also think it unlikely that the suspension of the limitation period running against any potential class member would last for an unduly long period of time. That is because in our view, and we so recommend, where a plaintiff proposes to bring a proceeding against a defendant class, the defendants should not be required to file or serve a defence until after the certification hearing. This means that the plaintiff's interest would be met by bringing the application sooner rather than later.

---

[390] ULCC DP, Part D.17, at 38.

c. Recommendation for defendant class actions

[455] We agree with the reasons supporting defendant class actions, and do not think the objections override them. To conclude that it should be possible for plaintiffs to initiate defendant class proceedings is not necessarily to conclude that such proceedings should be dealt with by the class proceedings legislation. There are two basic options for dealing with defendant class actions: (1) dealing with the subject in class proceedings legislation (Ontario's approach); or (2) leaving the subject to be dealt with under a vestigial rule 42 (by implication, the British Columbia and ULCC approach).[391] In our view, it would be as useful to provide a detailed structure for proceedings against defendant classes as for proceedings by plaintiff classes. As Adams, J. put it in *Chippewas of Sarnia* v. *Canada* when considering the defendants' contention that the matter should proceed under Ontario's rule 12.07 rather than the Ontario Act:[392]

> Clearly, if it applies, the C.P.A. is the most comprehensive regulatory vehicle for this type of litigation. While I accept that a representation order could be crafted to achieve many of the advantages of the C.P.A., it seems preferable to at least first use the C.P.A. with its available procedures and policy balances, if at all possible. Because of the great uncertainty which can arise in the administration of proceedings involving a multiplicity of parties, a court should prefer the most comprehensive regulatory regime reasonably available to it. This approach will promote economy, efficiency and expedition.

Taking our lead from this passage, as law reformers we should recommend that a "comprehensive regulatory regime" which will promote "economy, efficiency and expedition" be made available to the court. We believe that this goal could best be achieved by providing for defendant class proceedings as Ontario has done.

d. Modification of plaintiff class action provisions

[456] Although we have no hesitation in recommending that Alberta follow Ontario's approach of dealing with defendant class proceedings in its class proceedings legislation, we do have certain concerns about the details of the Ontario approach. For the most part, this approach seems to be premised on the assumption that all you need to do to adapt the plaintiff class proceeding structure

---

[391] Interestingly enough, in *Chippewas*, *supra* note 358, although the defendants opposed the Band's application to certify a defendant class action under the Ontario Act, they were not averse to the Band proceeding by way of a representative action under Ont rule 12.07 (the equivalent of our rule 42). Given the comprehensive scope of the Ontario's class proceedings legislation, it is not immediately obvious why it was thought necessary to retain the rule.

[392] *Chippewas*, *supra* note 358 at 568.

to the needs of defendant class proceedings is to add a word here and a phrase there to the statutory provisions. That is, all you need to do is make sure that there is symmetry between the treatment of plaintiff and defendant class proceedings. We think, however, that there are certain areas in which the provisions regarding defendant class actions cannot be simple mirror images of the provisions regarding plaintiff class actions. The great majority of the provisions in the ULCC Act either would not require any modification at all, or would require only the sort of modest adjustments mentioned in the preceding sentence. However, there are a few matters where we think it is necessary to consider whether it is really appropriate to take exactly the same approach to defendant class proceedings as is taken to plaintiff class proceedings. These are discussed below, in addition to certain matters that are not addressed in the Ontario Act.

i. Certification requirements: a plan for "advancing" the proceedings

[457] A drawback of the attempt to achieve perfect symmetry in the statutory treatment of plaintiff and defendant classes is illustrated by *Chippewas.* Section 5(1)(e) of the Ontario Act set out one of the statutory conditions precedent for certification of a class proceeding:

> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

The defendants in *Chippewas* argued that the implication of section 5(1)(e)(ii) must be that proceedings against a defendant class are possible only where there is a voluntary representative defendant. How could a proposed representative defendant who opposes certification be expected to have produced the plan for "advancing[393] the proceedings on behalf of the class" at the time of the application for certification? The court found this point troublesome but ultimately adopted a purposive reading of the section. If the other conditions for certification were satisfied, then certification could be postponed until the representative defendant had produced the plan required by section 5(1)(e)(ii). If necessary, the defendant could be ordered to produce the plan.[394] Although the court in *Chippewas* found a way around the difficulty created by section 5(1)(e)(ii), it illustrates that fine tuning class proceedings legislation to accommodate proceedings against defendant classes involves more than simply inserting terms such as "or defendant"[395] and "or defence"[396] in strategic places.

---

[393] Perhaps "obstructing" would be a better word, in the case of representative defendants.

[458] For reasons disclosed in *Chippewas* and discussed above, ULCC Act section 4(2)(e)(ii) is inappropriate when applied to proceedings against a defendant class. If applied literally to defendant class actions, it would require the representative defendant to have developed a plan for advancing the proceedings on behalf of the class and for notifying class members, as a condition precedent for certification. It is unrealistic to suppose that a person proposed as a representative defendant by the plaintiff will voluntarily come up with such a plan to assist the plaintiff's application for certification.

[459] The question is how to fix the problem. One possibility would be for the legislation to take the approach taken by the court in *Chippewas*. In our view, however, it simply should not be a criterion for certification to show that the representative defendant has produced a plan for advancing the proceeding and notifying class members. It should suffice to establish that the proposed representative defendant satisfies the other criteria set out in ULCC Act section 4(2)(e): namely, that the defendant will fairly and adequately represent the interests of the class, and that the defendant does not have a conflict of interest with other class members on the common issues. With respect to notice to members of the defendant class members, section 19 allows the court to ensure that appropriate notice is given to class members.

ii. Timing of application for certification

[460] One instance in which the Ontario Act does not take a symmetrical approach to plaintiff and defendant class proceedings is in the provisions dealing with the timing of an application for certification. Section 4 of the Ontario Act

---

[394] *Chippewas*, *supra* note 358 at 570-72.

[395] As in, e.g., Ont Act, s. 5(1)(b) and (e) and s. 5(2).

[396] As in, e.g., Ont Act, s. 5(1)(c): "the claims or defences of the class members raise common issues."

provides that a party may apply "at any stage of the proceeding" for its certification as a class proceeding and the appointment of a representative defendant. This contrasts with plaintiff class actions, where an application must be made within 90 days after the last statement of defence or appearance is delivered, unless leave of the court is obtained to make the application after that time. We cannot think of any reason for taking a more liberal approach to the timing of an application for certification of a defendant class action than is taken for plaintiff class actions.

[461] If anything, we would be inclined to argue that the default rule as to the timing of an application for certification of a defendant class action should be that the application must be made before the proposed representative defendant is required to file a statement of defence on behalf of the class. Given that the proposed representative defendant may well be arguing on the certification application that they should not be a representative defendant, it seems somewhat odd that they should be required to file a statement of defence on behalf of the defendant class before it is even determined whether the proceeding will be certified and, if it is, whether they will be the representative defendant.[397]

iii. The "common issue" requirement

[462] As discussed earlier in this report, one of the criteria for certification of a class proceeding under the ULCC Act is that there be a "common issue." In section 5(1)(c) of the Ontario Act this criterion is framed thus: " the claims or defences of the class members raise common issues." Although we agree with the policy of the Ontario provision as applied to defendant class proceedings, we have reservations about the wording. The wording of the provision suggests that, in a proposed defendant class proceeding, one considers only whether the "defences" of the class raise a common issue. However, it is more likely that the claims against the class members will raise a common issue, or that the defences of the class raise a common issue because the claims against them raise a common issue. It is hard to imagine a situation in which a defence (such as a limitations defence) of the class members raised a common issue but the claim against them did not. Therefore, we would word the Alberta equivalent of Ontario section 5(1)(c)

---

[397] It is noteworthy that in *Chippewas*, *supra* note 358, not all of the entities whom the plaintiffs proposed as representative defendants were considered by the court to be satisfactory representative defendants: [1996] O.J. No. 2820 (supplementary reasons).

(ULCC Act, s. 4(2)(c)) like this: "the claims of or against the class members raise a common issue."[398]

[463] One context in which common issues raised by potential defences of class members (as opposed to the underlying claims against them) may be of independent significance is in establishing defendant subclasses. Limitations defences present an obvious case where one subclass of the defendant class may be in a much different position than another. With this in mind, we would modify the relevant portion of ULCC Act section 6(1) so that subclassing might be based on differences raised by the claims against or differences raised by the defences of different members of the defendant class. This can be achieved by the addition of the italicized phrases to section 6(1) of the ULCC Act:[399]

> . . . if a class includes a subclass whose members have *or are subject to* claims *or defences* that raise common issues not shared by all the class members . . .

iv. Opting in or out

(a) Resident defendants

[464] Perhaps the most significant issue relating to defendant class actions is whether class members should be given the same right to opt out that is given to members of the plaintiff class. If members of the plaintiff class are allowed to opt out of a class proceeding, why shouldn't defendants be given the same right? We think that there are at least two answers to this question. The first answer is that different treatment of plaintiff and defendant class members on this issue is consistent with the asymmetric approach taken to plaintiffs and defendants in ordinary (i.e., non-class) litigation. Generally speaking, no one can be required to become an involuntary plaintiff in a legal proceeding. If members of a plaintiff class were not given a right to opt out of a class action, this would deprive them of a right not to litigate that they would have with respect to ordinary actions.[400] But

---

[398] As mentioned in the text, it seems unlikely that a defence of the class members would raise a common issue unless the claim against the class members raises a common issue.

[399] This wording is very similar to Ont Act, *supra* note 5, s. 5(2), but the latter omits the phrase "or subject to."

[400] As discussed earlier, an opt-out regime puts the onus on members of the plaintiff class to take positive steps to indicate that they do not want to participate in the litigation, which contrasts with an ordinary action where they must take positive steps (usually, instructing a lawyer) to indicate that they want to participate. In either case, though, they have a choice.

what of defendants? Generally speaking, plaintiffs choose who they will name as defendants in their lawsuits, and the only way that someone so named can remove themselves from the lawsuit at an early stage is by establishing that there is no foundation for the plaintiff's claim against them. In short, the ordinary civil litigation process would not be terribly effective if defendants could choose to opt out of lawsuits. In considering whether members of a defendant class should have the right to opt out or not, we think the more appropriate analogy is with defendants in ordinary actions than with members of the plaintiff class in a plaintiff class action. On this basis we do not think that members of the defendant class should have the right to opt out of the proceeding.

[465] The second answer is that an unfettered opt-out right would have a potential to frustrate the purpose of defendant class proceedings that it would not have in the case of plaintiff class proceedings. If a defendant class action is certified, one of the underlying premises of the certification order must be that the "pleadings disclose a cause of action" against each person who is a member of the defendant class, as defined in the order.[401] Given this premise and the other criteria for certification of a defendant class action, it seems fair to suppose that each person who falls within the defendant class would have been a proper party defendant to an ordinary, multiparty action by the plaintiff. It must further be supposed, since it is a criterion for certification, that the court has concluded that a defendant class action is the preferable procedure for the fair and efficient resolution of the common issues.[402] Therefore, we do not see why members of the defendant class should be allowed to opt out of what has been determined to be the fair and efficient procedure for resolving the common issues.

---

[401] The Ont Act, *supra* note 5, states explicitly (as does the ULCC Act) that the pleadings must disclose a cause of action. It does not say against whom they must disclose a cause of action in a defendant class proceeding. Presumably, however, they must disclose a cause of action against every member of the class. Another way of putting it is that the certification order must presumably define the defendant class in such a way that anyone who falls within the class definition would be a person against whom the pleadings disclose a cause of action.

[402] In each of the three cases discussed above – *Greenbank*, *supra* note 354 in Alberta, *Irish Shipping*, *supra* note 363 in England, and *Chippewas*, *supra* note 358 in Ontario – the major advantage of the representative proceeding over an ordinary multiparty proceeding was its avoidance of the major trouble and expense of naming and serving the numerous defendants.

[466] If a class member has any legitimate objection to being treated as such in a defendant class action, it is likely to be because they believe or fear that their interests will not be adequately protected by the representative defendant. If a class member has such a belief or fear, it can be addressed without giving them the option of unilaterally excluding themself from the proceeding. One option, suggested in *Greenbank*,[403] is that the uneasy member could apply for the appointment of an additional representative defendant to represent a subclass. That option, we feel, is a better safeguard for the uneasy, but proper, party to the action. It would be provided by section 6 of the ULCC Act modified to provide for defendant class actions, as we recommend.

[467] Another possibility, suggested in *Irish Shipping*,[404] is that a class member could apply to be named as a defendant in the proceeding. This would give them the opportunity to conduct (and pay for) their own defence through their own lawyers. We believe and recommend that Alberta class proceedings legislation should specifically allow a member of the defendant class to apply to be named as an individual defendant. If added as an individual defendant, this person would no longer be treated as a member of the class.[405] We suspect that members of a defendant class would rarely see any advantage to being transformed from a passive, represented class member into an active, named defendant. Nevertheless, we think it is important for the legislation to provide for this possibility, so as to address any perception that defendant class members might be prejudiced if required to rely on a representative defendant to protect their interests. We recommend that, along with the option of applying for the appointment of an additional representative defendant to represent a subclass, defendant class members should have the option of being excluded from the class but added as named defendants. Here, we are recommending an approach that is not dissimilar to the approach that has been taken under rule 42.[406]

---

[403] *Greenbank*, *supra* note 354 at 714, 715.

[404] *Irish Shipping*, *supra* note 363 at 862.

[405] We are assuming that the person is not applying to be added as a represented defendant for a subclass of the defendant class.

[406] It is also in line with the approach that is taken in class proceedings legislation in many US states: Wolfson, *supra* note 352 at 494.

(b) Non-resident defendants

[468] What of non-residents who would, but for their non-residency, be part of the defendant class? Should they be regarded as members of the class only in the unlikely event that they decide to opt in to the proceedings? As it does for plaintiff class proceedings, the Ontario Act gives both resident and non-resident defendant class members the right to opt out of a defendant class proceeding.[407] It does not distinguish between residents and non-residents. For Alberta, we have recommended that residents and non-residents plaintiff class members be treated differently. Resident plaintiff class members would have the right to opt out whereas non-resident plaintiff class members would have to opt in. We have recommended against giving resident defendant class members the right to opt out of a defendant class proceeding. We think it unlikely that a non-resident class member would choose to opt in. Moreover, where the plaintiff would be able to bring an individual action against a non-resident we see no reason why the plaintiff should not be able to obtain relief against the same non-resident in a defendant class action. The result is that we would not permit either resident or non-resident defendant class members to opt out of a defendant class proceeding. Like a resident class member, we would permit a non-resident class member to ask the court to name them as an individual defendant in the proceeding or to establish a non-resident subclass with its own representative defendant.

v. Discontinuance

[469] The considerations that call for a court approval requirement for discontinuance of a plaintiff class action do not apply to a defendant class action. That is to say, we do not see how the represented defendants could be prejudiced if the plaintiff is simply permitted to discontinue the action. We therefore recommend that section 35 of the ULCC Act be amended to provide that a plaintiff may discontinue a defendant class proceeding without the approval of the court.

vi. Limitation periods

[470] In a plaintiff class action, the limitation period is suspended in favour of plaintiff class members so long as the class proceeding is alive. If the plaintiff class action were to be discontinued with the consent of the court five years after the action was commenced, the limitation would have been suspended throughout this period. Applying the same limitation provision to the plaintiff in a defendant

---

[407] Ont Act, *supra* note 5 s. 9.

class action would allow a plaintiff who discontinued an action five years after it was certified to say that the limitation period did not run in favour of the defendants during that five-year period.

[471] In our view, the policy reasons for suspending limitation periods will be adequately served if the limitation periods in favour of potential class members are suspended from the commencement of the proceeding until the certification decision is made. By "potential class members" we mean persons who could reasonably be regarded as members of the class against whom a plaintiff asserts claims or seeks relief in a defendant class proceeding. We do not see any reason why the plaintiff in a defendant class action who discontinues the action after certification should be in any better position with respect to the running of limitation periods than a plaintiff in an ordinary action. As stated previously (heading R.4.c.vi), suspending the limitation period up to the time that certification is granted or refused saves plaintiffs from the necessity of commencing separate proceedings against potential defendant class members before any individual limitation periods expire, and thereby fosters the goal of judicial economy. Once the certification decision is made (no matter whether certification is granted or refused), the limitation periods should start running again. Thus, if the plaintiff decides to discontinue the proceedings several years after certification or the representative defendant successfully applies to have the proceedings dismissed for want of prosecution, the plaintiff will find that the limitation period for commencing a new action has expired.

[472] We recommend that the commencement of a proposed defendant class action should suspend the limitation periods within which a plaintiff must bring suit against potential defendant class members. Those limitations periods should resume once the certification decision has been made. The effect will be that a plaintiff can wait for a certification decision without having to sue individual defendants in order to protect themself from the expiration of limitation periods. Limitation periods will resume running once a certification decision is made. If certification is refused, the plaintiff will be able to commence individual actions. If certification is granted, the plaintiff will not be able to extend limitation periods indefinitely. In addition, we recommend that if the proceeding is discontinued before the certification hearing, the limitation period should start to run again upon discontinuance.

[473] We make one further point. We note that section 39 of the ULCC Act makes several references to "cause of action" whereas Alberta's *Limitations Act* now refers to "claims" rather than causes of action. In Alberta, "cause of action" should be changed to "claim."

RECOMMENDATION No. 26

(1) The Alberta class actions regime should provide for defendant class proceedings, that is, proceedings in which one or more individual plaintiffs seek relief against a defendant class. Except as otherwise indicated in subsections (2) to (4), the provisions dealing with plaintiff class actions should apply, with any necessary modifications, to defendant class actions.

(2) Where a plaintiff intends to apply for certification of a defendant class proceeding, the proposed representative defendant should not be required to file a statement of defence on behalf of the class until after the certification hearing.

(3) The condition precedent to certification, that the proposed representative plaintiff has produced a plan for advancing the proceedings on behalf of the class and for notifying class members of the proceeding, should not apply to the proposed representative defendant in a defendant class action.

(4) Members of the defendant class should not have the right to opt out of a defendant class proceeding. However, specific provision should be made giving any member of the defendant class the right to apply to be added as a named defendant for the purpose of conducting their own defence.

(5) A plaintiff should have the right to discontinue a defendant class proceeding without the approval of the court.

(6) The limitation period within which a plaintiff must bring action against a defendant should be suspended by the commencement of a proceeding in which that defendant is a potential member of a defendant class and resume running upon certification or, if the proceeding is discontinued before certification, upon discontinuance.

S. Application of Class Proceedings Provisions

1. Why the issue arises

[474] There may be circumstances in which the new provisions should not apply. These may have to be identified.

2. Rule 42

[475] Rule 42 is silent in this respect.

3. Class proceedings precedents

[476] Canadian class proceedings regimes do not apply in three circumstances. These are (ULCC Act, s. 41):

> (a) a proceeding that may be brought in a representative capacity under another Act,
>
> (b) a proceeding required by law to be brought in a representative capacity, and
>
> (c) a representative proceeding commenced before this Act comes into force.

4. Consultation and recommendation

[477] No comments about restrictions on the application of the regime were received on consultation.

[478] We recommend the adoption of the ULCC provision. However, because our recommendations differ from the ULCC Act in recognizing defendant classes, we would modify paragraph (a) of section 41 by adding the words "or defended" after "may be brought."

RECOMMENDATION No. 27

If these recommendations are implemented, the new law should not apply to:

(a) a proceeding that may be brought in a representative capacity under a statutory provision,

(b) a proceeding required by law to be brought in a representative capacity, and

(c) a representative proceeding commenced before the new law takes effect.

CHAPTER 5. CONCLUSION

A. Principles Applied

[479] This project has proceeded from the proposition that Alberta's civil justice system may not adequately accommodate class actions. We have asked whether Alberta class action procedures should be reformed, and concluded that they should be.

[480] Our objectives in the project have been:

(1) to examine the existing law and procedures that govern proceedings in which a number of plaintiffs have the same or similar claims against a defendant,
(2) to assess the problems in the operation of that law,
(3) if appropriate, to make recommendations for improvements that will alleviate those problems,
(4) in so doing, to consider whether it is necessary, or possible, to provide a more satisfactory procedural framework in which to meet the multiple plaintiff litigation demands of modern Alberta, and
(5) ancillary to this, to examine whether the law requires any changes where a number of defendants are in the same or a similar position in relation to claims brought against them.

[481] In designing our recommendations for reform, we have been guided by certain principles. They are that Alberta's civil justice system for class actions should be fair, certain and efficient. To be fair, the law should enable plaintiffs to bring deserving claims and protect defendants from unreasonable claims. The process for resolving issues should be certain and efficient.

[482] We believe that, taken together as a package, our recommendations satisfy these principles. The recommendations will improve access to justice for plaintiffs, partially righting the existing imbalance between claimants with meagre resources and defendants with large means. They will also serve a regulatory function by helping to deter wrongful behaviour by potential defendants. The

recommendations will make the procedures clear to both plaintiffs and defendants. If certification is granted, defendants will be able to know where they stand with respect to the number of claims that are or may be brought against them and, insofar as the proceedings bind all class members, find an end to the matter.

B. Implementation: Statute or Rules?

[483] One question remains to be determined and that is whether the new regime should be implemented by statute or rules or some combination of the two. To date, the Canadian jurisdictions that have introduced class proceedings regimes have done so by statute (i.e., Ontario, British Columbia and Quebec). Statutory implementation is also recommended by the ULCC and Manitoba Law Reform Commission. This fact notwithstanding, the Rules Committee of the Federal Court is of the opinion that similar reforms can be introduced through amendment to its procedural rules. Moreover, U.S. Federal Rule 23 has always been judge-made and the Scottish Law Reform Commission felt that even an expansive class proceedings regime was within the court's rule-making power.[408] Therefore, the choice is open. Before making our recommendation, we identify some of the advantages and disadvantages of each of the three choices.

1. Statutory implementation

[484] Advantages of statutory implementation include that:

- statutory implementation gives class proceedings high visibility, signifying that class proceedings differ significantly from other litigation;

- because the introduction of a class proceedings regime is a significant and potentially controversial legal development, the issues "deserve to be debated fully in the Legislative Assembly, rather than passed by way of regulation. ..."[409]

- some of the class proceedings provisions are better characterized as substantive rather than procedural (the suspension of limitation periods, revision of the *res judicata* principle to make the outcome binding on class members, adoption of evidence principles specific to class proceedings, the introduction of aggregate assessment of damages[410]) and legislation is required to make these changes;

---

[408] SLC Report, *supra* note 18, cited in ManLRC Report, *supra* note 8 at 38-39.

[409] OLRC Report, *supra* note 15, 63 at para. 4.9, referred to in ManLRC Report, *supra* note 8 at 38.

- where it is difficult to distinguish between substantive and procedural law, legislation will ensure its validity; and

- legislation makes obvious the procedures and substantive measures available to deal with multiple plaintiffs having similar claims against the same defendant or defendants and this will foster procedural predictability and consistency.

On the other hand, even if class actions legislation is enacted, it may remain necessary to review the rules for consequential amendments.

2. Rules implementation

[485] Many of the improvements that could be made in cases where multiple plaintiffs have a common interest or claim are procedural and many of the shortcomings of rule 42 could be remedied by the amendment of the existing rules to provide more detailed procedures. In support of implementation by rules amendment, it can be said that:

- most of the shortcomings of rule 42 focus on procedure and, because the reforms are essentially procedural, they are better suited to treatment in the rules;

- the reforms may need fine-tuning once they are put into effect and rules are more readily amended than statutory provisions (the Rules of Court Committee can recommend changes to Cabinet for implementation by regulation which is a simpler process than obtaining statutory amendments by legislative enactment); and

---

[410] ManLRC Report, *ibid*.

- implementation by rules amendment will attract less public attention (enacting the procedure in legislation tends to create the public perception of a government decision that citizens should become more involved).

However, because substantive law changes cannot be introduced through rules, statutory provisions of a supplementary nature would still be required.

3. Both statute and rules

[486] It may be thought that the third alternative – rules for the clearly procedural recommendations and statute for the substantive law recommendations – would give the best of both worlds. There would be some advantage to pulling together many of the now disparate operative elements of a class action in amended rules supplemented by legislative amendments to existing statutes or the enactment of a short class proceedings statute. However, the provisions constituting the class actions regime would still be somewhat scattered, making them more difficult to ascertain than provisions in a single comprehensive statute.

4. Recommendation

[487] All in all, we think that statutory reform is the desirable choice and recommend the enactment of class proceedings legislation.

RECOMMENDATION No. 28
Alberta should implement the recommendations for a class proceedings regime by statute.

B.R. BURROWS
C.W. DALTON
A. DE VILLARS
A.D. FIELDING
N.A. FLATTERS
W.H. HURLBURT
H.J.L. IRWIN
P.J.M. LOWN
A.D. MACLEOD
S.L. MARTIN
D.R. OWRAM
B.L. RAWLINS
N.C. WITTMANN
R.J. WOOD

CHAIRMAN

DIRECTOR

December 2000

APPENDIX A
ULCC *CLASS PROCEEDINGS ACT*

Contents

PART 1: Definitions

1. Definitions

PART II: Certification

2. Plaintiff's class proceeding
3. Defendant's class proceeding
4. Class certification
5. Certification application
6. Subclass certification
7. Certain matters not bar to certification
8. Contents of certification order
9. Refusal to certify
10. If conditions for certification not satisfied

PART III: Conduct of Class Proceedings

Role of Court

11. Stages of class proceedings
12. Court may determine conduct of proceeding
13. Court may stay any other proceeding
14. Applications

Participation of Class Members

15. Participation of class members
16. Opting out and opting in
17. Discovery
18. Examination of class members before an application

Notices

19. Notice of certification
20. Notice of determination of common issues
21. Notice to protect interests of affected persons
22. Approval of notice by the court

23. Giving of notice by another party
24. Costs of notice

PART IV: Orders, Awards and Related Procedures

Order on Common Issues and Individual Issues

25. Contents of order on common issues
26. Judgment on common issues is binding
27. Determination of individual issues
28. Individual assessment of liability

Aggregate Awards

29. Aggregate awards of monetary relief
30. Statistical evidence may be used
31. Average or proportional share of aggregate awards
32. Individual share of aggregate award
33. Distribution
34. Undistributed award

Termination of Proceedings and Appeals

35. Settlement, discontinuance, abandonment and dismissal
36. Appeals

PART V: Costs, Fees and Disbursements

37. Costs
38. Agreements respecting fees and disbursements

PART VI: General

39. Limitation periods
40. Rules of Court
41. Application of Act

PART I: Definitions

Definitions

Recommendation 3(2).
Discussed in chapter 4, headings A.1(pp. 67-75) and B.5.i (pp. 85-86).
In particular, see p. 72 (definition of "common issues"), p. 86 (definition of "settlement class").

1. In this Act:

"certification order" means an order certifying a proceeding as a class proceeding;

"class proceeding" means a proceeding certified as a class proceeding under Part 2;

"common issues" means

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

"court", except in sections 36 (4) and 37, means the [superior court of the jurisdiction];

"defendant" includes a respondent;

"plaintiff" includes a petitioner.

ULCC Commentary: Section 1 contains the definitions for the Act. Throughout the Act, a "plaintiff" includes a representative plaintiff and a petitioner but does not extend to other class members. Section 1 also sets out a definition of "common issues" that is designed to override the common law on when a "representative action" is permitted.

Other Jurisdictions:

[1] In Ont. s. 1, "court" means the Ontario Court (General Division) and excludes the Small Claims Court; in B.C. s. 1, "court", except in ss. 36(4) [representative plaintiff leave to appeal] and 37 [costs, includes Court of Appeal], means the Supreme Court; in ManLRC s. 1, "court", except in s. 37 [costs, includes Court of Appeal], means the Court of Queen's Bench.

PART II: Certification

Plaintiff's class proceeding

Recommendation 5(1) and (3).
Discussed in chapter 4, heading B (pp. 76-87).
In particular, see pp. 80-81 (residency not required),
p. 83 (timing of application).

2.- (1) One member of a class of persons who are resident in [the enacting jurisdiction] may commence a proceeding in the court on behalf of the members of that class.

(2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.

(3) An application under subsection (2) must be made

(a) within 90 days after the later of

(i) the date on which the last appearance or statement of defence was delivered, and

(ii) the date on which the time prescribed by the [rules of court] for delivery of the last appearance or statement of defence expires without its being delivered, or

(b) with leave of the court at any other time.

(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

ULCC Commentary: Section 2 sets out the procedures for commencing a proceeding and for applying to the court to have that proceeding certified as a class proceeding. This section also permits the court to certify a non-class member as a representative plaintiff in order to avoid a substantial injustice to the class. This provision is similar to the Quebec legislation.

Other Jurisdictions:

[1] Ont. s. 2(1) permits one or more members of a class to commence a class actions proceeding and does not specify that the member or members must be "resident" in Ontario.

[2] Ont. does not have a subsection (4).

Defendant's class proceeding

Recommendation 5(2).
Discussed in chapter 4, heading B (pp. 81-82).
In particular, see p. 82 (defendant application not restricted).

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make an application to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

ULCC Commentary: Section 3 permits a defendant to two or more proceedings to apply to the court for a order certifying those proceedings as a class proceeding. The section is intended to allow a defendant to consolidate proceedings against him or her if the court is satisfied those proceedings meet the test for a class proceeding.

Other Jurisdictions:

[1] Ont. s. 4 permits the court, on motion, to appoint a representative defendant to represent a class consisting of two or more defendants:

> Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

[2] In Alberta, the appointment of a representative for a defendant class is permitted by AR 42.

Class certification

Recommendations 3(1), (8) and 6.
Discussed in chapter 4, headings A.1 (pp. 67-75), B.5.e (p. 84), C (pp. 87-92)
In particular, see pp. 72-73 (add "fair and efficient" to s. 4(d), ancillary use of ADR), p. 84 (court must certify where criteria satisfied), pp. 85-86 (certification of a settlement class), p. 91 (person should include a non-profit society).

4.- The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if

(a) the pleadings disclose a cause of action,

(b) there is an identifiable class of 2 or more persons,

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members,

(d) a class proceeding would be the preferable procedure for the resolution of the common issues, and

(e) there is a representative plaintiff who

  (i) would fairly and adequately represent the interests of the class,

  (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

  (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

ULCC Commentary: Section 4 sets out the tests that a proceeding must clear in order to be certified as a class proceeding by the court. Clause (C) was included so that common issues did not have "outnumber" or "outweigh" individual issues. This was to avoid the result of the trial level decision in Abdool v. Anaheim Management Ltd. There the court refused to certify the case because it found that the common issues did not predominate over the individual decisions.

Other Jurisdictions:

[1] B.C. and ManLRC add s. 4(2):

> In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the membersof the class predominate over any questions affecting only individual members;
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> (d) whether other means of resolving the claims are less practical or less efficient;
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Certification application

Recommendation 5(4).
Discussed in chapter 4, headings B.5.d and B.5.f (pp. 83-85).

5.- (1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

ULCC Commentary: This section allows the court to adjourn the application for certification in order to permit parties to amend their materials or in order to permit further evidence.

Other Jurisdictions:

[1] B.C. s. 5(1) requires the application to be supported by an affidavit of the applicant. B.C. ss. 5(2) to (5) set out further requirements with respect to the filing and delivery of the affidavit:

> (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.
> (2) A copy of the notice of motion and supporting affidavit must be filed and
> (a) delivered to all persons who are parties of record, and
> (b) served on any other persons named in the style of proceedings.
> (3) Unless otherwise ordered, there must be at least 14 days between
> (a) the delivery or service of a notice of motion and supporting affidavit, and
> (b) the day named in the notice of motion for the hearing.
> (4) Unless otherwise ordered, a person to whom a notice of motion and affidavit is delivered under this section or on whom a notice of motion and affidavit is served under this section must, not less than 5 days or such other period as the court may

> order before the date of the hearing of the application, file an affidavit and deliver a copy of the filed affidavit to all persons who are parties of record.
> (5) A person filing an affidavit under subsection (2) or (4) must
> > (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
> > (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
> > (c) provide the person's best information on the number of members in the proposed class.

[2] Ont. s. 5(3) requires each party to file an affidavit that includes information about the class size:

> Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

Subclass certification

Recommendations 3(5) and 5(5).
Discussed in chapter 4, headings A.1 (pp. 67-75) and C (pp. 87-92).
In particular, see pp. 72 and 74 (creation of subclasses), p. 91 (subclass representative plaintiff need not be resident).

6.- (1) Despite section 4, if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court may, in addition to the representative plaintiff for the class, appoint a representative plaintiff for each subclass who

(a) would fairly and adequately represent the interests of the subclass,

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and

(c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

(2) A class that comprises persons resident in [the enacting jurisdiction] and persons not resident in [the enacting jurisdiction] must be divided into resident and non-resident subclasses.

ULCC Commentary: Where a class includes a subclass, whose members have claims that raise common issues, section 6 permits the court to appoint a representative plaintiff for that subclass, subject to certain conditions. Subclassing has been included to permit the more efficient and just determination of proceedings that have numerous issues which may not be common to all class members.

Other Jurisdictions:
[1] Courts in Ontario have certified the representation of a "national" class.

Certain matters not bar to certification

Recommendation 4.
Discussed in chapter 4, heading A.2 (pp. 75-76).

7. The court must not refuse to certify a proceeding as a class proceeding by reason only of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

ULCC Commentary: Section 7 recognizes the courts historic conservatism in class proceedings by expressly stating certain matters that are not to be a bar to certification. Those matters include where the relief claimed will require individual assessment, where the relief claimed relates to separate contracts, where different remedies are sought for different class members and where the number and identity of class members is not ascertainable.

Contents of certification order

Recommendation 5(6) and (7)
Discussed in chapter 4, headings B.5.f and B.5.i (pp. 84-86). In particular, see p. 84 (add ss. (4)–court may replace representative plaintiff) and pp. 85-86 (add s. 8.1–certification of settlement class).

8.- (1) A certification order must

(a) describe the class in respect of which the order was made by setting out the class's identifying characteristics,

(b) appoint the representative plaintiff for the class,

(c) state the nature of the claims asserted on behalf of the class,

(d) state the relief sought by the class,

(e) set out the common issues for the class,

(f) state the manner in which and the time within which a class member may opt out of the proceeding,

(g) state the manner in which, and the time within which, a person who is not a resident of [the enacting jurisdiction] may opt in to the proceeding, and

(h) include any other provisions the court considers appropriate.

(2) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the certification order must include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.

(3) The court may at any time amend a certification order on the application of a party or class member or on its own motion.

ULCC Commentary: Section 8 requires that a certification order must describe the class, appoint the representative plaintiff(s), state the nature of the claims asserted and the relief sought, set out the common issues for the class, state the manner for opting out of a class and any other provisions the court considers appropriate.

Other Jurisdictions:

[1] B.C. adds s. 8(4):

> **Without limiting the generality of subsection (3), where it appears to the court that a representative plaintiff is not acting in the best interests of the class, the court may substitute another class member or any other person as the representative plaintiff.**

Refusal to certify

Recommendation 5(9) (refusal to certify).
Discussed in chapter 4, headings B.5.g and B.5.h (p. 85).
In particular, see p. 85 (redrafting needed).

9.- If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may

(a) order the addition, deletion or substitution of parties,

(b) order the amendment of the pleadings, and

(c) make any other order that it considers appropriate.

ULCC Commentary: If a court refuses to certify a proceeding as a class proceeding, section 9 allows the court to permit the proceeding to continue as a "non-class" proceeding and to order the addition, deletion or substitution of parties, the amendment of the pleadings or to make any other order the court considers appropriate. In this way, the plaintiff(s) can still pursue a legal remedy despite the fact that the court has refused to certify the matter as a class proceeding.

If conditions for certification not satisfied

Recommendations 5(9) (decertification) and
6(2) (replacing representative plaintiff).
Discussed in chapter 4, heading B.5.h (p. 85).
In particular, see p. 85 (redrafting needed).

10.- (1) Without limiting subsection 8 (3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or subsection 6 (1) are not satisfied with respect to a class proceeding.

(2) If the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in section 9 (a) to (c) in relation to each of those proceedings.

ULCC Commentary: Section 10 allows the court to amend the certification order or decertify the proceeding if the court is satisfied that the conditions described in section 4 or 6 are no longer met.

PART III: Conduct of Class Proceedings

Role of Court

Stages of class proceedings

Recommendation 10.
Discussed in chapter 4, heading G (pp. 106-108).

11.- (1) Unless the court otherwise orders under section 12, in a class proceeding,

(a) common issues for a class must be determined together,

(b) common issues for a subclass must be determined together, and

(c) individual issues that require the participation of individual class members must be determined individually in accordance with sections 27 and 28.

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

ULCC Commentary: According to this section, in a class proceeding, common issues for a class must be determined together, common issues for a subclass must be determined together and individual issues that require the participation of individual class members must be determined in accordance with sections 27 and 28. This structure should help to ensure that class proceedings are heard in the most efficient manner possible.

Court may determine conduct of proceeding

Recommendation 11(1).
Discussed in chapter 4, heading H (pp. 108-112).
In particular, see p. 111 (power to determine the conduct of a class proceeding).

12. The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

ULCC Commentary: Section 12 grants the court broad discretion in making orders to ensure the "fair and expeditious determination" of a class proceeding. This broad discretion is thought necessary as the court must protect not only the interests of the representative plaintiff and the defendant but also the interests of absent class members.

Court may stay any other proceeding

Recommendation 11(1).
Discussed in chapter 4, heading H (pp. 108-112).
In particular, see pp. 111-112 (power to stay or sever proceedings).

13. The court may at any time stay or sever any proceeding related to the class proceeding on the terms the court considers appropriate.

ULCC Commentary: This section gives the court wide discretion to stay or sever any proceeding related to a class proceeding. Like section 12, this discretion was necessary to allow the court to protect the interests of the representative plaintiff, defendant and absent class members.

Applications

Recommendation 11(2).
Discussed in chapter 4, heading H (pp. 108-112).
In particular, see p. 112 (trial judge).

14.- (1) The judge who makes a certification order is to hear all applications in the class proceeding before the trial of the common issues.

(2) If a judge who has heard applications under subsection (1) becomes unavailable for any reason to hear an application in the class proceeding, the chief justice of the court may assign another judge of the court to hear the application.

(3) A judge who hears applications under subsection (1) or (2) may but need not preside at the trial of the common issues.

ULCC Commentary: The requirement that a judge who hears the certification order is to hear all applications that arise before the trial on the common issues is included as another effort to determine the issues arising in a certification hearing in an expeditious manner by recognizing the complex nature of class proceedings.

Other Jurisdictions:
[1] Under Ont. s. 34(3), the motions judge shall not preside at the trial of the common issues "unless the parties agree otherwise".

Participation of Class Members

Participation of class members

Recommendation 8.
Discussed in chapter 4, heading E (pp. 100-102).

15.- (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding if this would be useful to the class.

(2) Participation under subsection (1) must be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

ULCC Commentary: Section 15 permits the courts to allow class members to participate in the class proceeding if their participation is necessary to ensure the fair and adequate representation of the interests of the class.

Opting out and opting in

Recommendation 7.
Discussed in chapter 4, heading D (pp. 92-100).
In particular, see p. 98 (opting out for residents), pp. 98-99 (opting in for non-residents), p. 99 (clarification of status as a class member), pp. 99-100 (restriction on opting out if plaintiff class certified on defendant's application).

16.- (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

(2) Subject to subsection (4), a person who is not a resident of [the enacting jurisdiction] may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of [the enacting jurisdiction], a member of the class involved in the class proceeding.

(3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.

(4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).

(5) If a subclass is created as a result of persons opting in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8(2).

ULCC Commentary: The draft bill is based on an opt out model of class proceedings for residents and on an opt in model for non-residents of the jurisdiction. This means that persons who match the characteristics of the class as set out in the certification order are, if residents, members of the class until they opt out of the proceeding and, if not residents, not members unless they opt in.

Discovery

> **Recommendation 12(1), (2) and (4).**
> **Discussed in chapter 4, heading I (pp. 112-124).**
> **In particular, see pp. 120-122 (court power to limit scope of discovery of a class member and use of evidence obtained, court may require parties to propose which class members should be discovered).**

17.- (1) Parties to a class proceeding have the same rights of discovery under the [rules of court] against one another as they would have in any other proceeding.

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 6, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.

(3) In deciding whether to grant a defendant leave to discover other class members, the court must consider

(a) the stage of the class proceeding and the issues to be determined at that stage,

(b) the presence of subclasses,

(c) whether the discovery is necessary in view of the defences of the party seeking leave,

(d) the approximate monetary value of individual claims, if any,

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered, and

(f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the [rules of court] as a party for failure to submit to discovery.

ULCC Commentary: Section 17 sets out the discovery rules in a class proceeding. To avoid the possibility that the defendant could attempt to discover each class member, the section permits the defendant to discover class members other than the representative plaintiff only with leave of the court. This section also sets out a number of criteria the court must consider before granting the defendant leave to discover other class members.

Examination of class members before an application

Recommendation 12(3) and (4).
Discussed in chapter 4, heading I (pp. 112-124).
In particular, see pp. 122-123 (adapt to language of rule 266).

18.- (1) A party may not require a class member, other than a representative plaintiff, to be examined as a witness before the hearing of any application, except with leave of the court.

(2) Subsection 17 (3) applies to a decision whether to grant leave under subsection (1) of this section.

ULCC Commentary: Section 18 ties into section 17 by prohibiting the examination of class members other than the representative plaintiff without leave of the court.

Notices

Recommendation 9.
Discussed in chapter 4, heading F (pp. 102-106).
In particular, see p. 103 (add to s. 19(4) "notice by creating or maintaining an Internet site", residents who do not opt out are bound by result reached by judgment or settlement), pp. 103-104 (notice of certification made on behalf of a settlement class to include terms of settlement).

Notice of certification

Recommendation 9(1)-(4).
Discussed in chapter 4, heading D (pp. 92-100).
In particular, see p. 98 (opting out by residents, opting in by non-residents).

19.- (1) Notice that a proceeding has been certified as a class proceeding must be given by the representative plaintiff to the class members in accordance with this section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) The court must make an order setting out when and by what means notice is to be given under this section and in doing so must have regard to

(a) the cost of giving notice,

(b) the nature of the relief sought,

(c) the size of the individual claims of the class members,

(d) the number of class members,

(e) the presence of subclasses,

(f) the places of residence of class members, and

(g) any other relevant matter.

(4) The court may order that notice be given by

(a) personal delivery,

(b) mail,

(c) posting, advertising, publishing or leafleting,

(d) individually notifying a sample group within the class, or

(e) any other means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

(6) Unless the court orders otherwise, notice under this section must

(a) describe the proceeding, including the names and addresses of the representative plaintiffs and the relief sought,

(b) state the manner in which and the time within which a class member may opt out of the proceeding,

(c) state the manner in which and the time within which a person who is not a resident of [the enacting jurisdiction] may opt in to the proceeding,

(d) describe any counterclaim or third party proceeding being asserted in the proceeding, including the relief sought,

(e) summarize any agreements respecting fees and disbursements

(i) between the representative plaintiff and the representative plaintiff's solicitors, and

(ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff for that subclass and that representative plaintiff's solicitors,

(f) describe the possible financial consequences of the proceedings to class members and subclass members,

(g) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the proceeding,

(h) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the proceeding,

(i) describe the rights, if any, of class members to participate in the proceeding,

(j) give an address to which class members may direct inquiries about the proceeding, and

(k) give any other information the court considers appropriate.

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.

ULCC Commentary: This section recognizes that the notice requirements for a class proceeding will vary widely from proceeding to proceeding. In addition to allowing the court to dispense with notice, where appropriate, section 19 states that the court is to consider factors like the cost of the notice and the size of the class when deciding whether or not to require notice. This section permits notice to be given in a variety of ways and to different class members by different means, all in an attempt to give the court the flexibility to craft an appropriate type of notice. Section 19 also sets out a series of mandatory items that must be included where notice is given including information about the nature of the proceeding, the opt out procedure, a description of the possible financial consequences of the proceeding for class members and a summary of any agreement respecting fees and disbursements.

Other Jurisdictions:

[1] B.C. s. 19(3) adds as a factor "whether some or all of the class members may opt out of the class proceeding".

[2] ManLRC s. 19(4) adds as a factor "creating and maintaining an Internet site".

Notice of determination of common issues

Recommendations 9(1)(b) and (3).
Discussed in chapter 4, heading F (pp. 102-106).

20.- (1) Where the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

(2) Subsections 19 (3) to (5) apply to notice given under this section.

(3) Notice under this section must

(a) state that common issues have been determined,

(b) identify the common issues that have been determined and explain the determinations made,

(c) state that members of the class or subclass may be entitled to individual relief,

(d) describe the steps that must be taken to establish an individual claim,

(e) state that failure on the part of a member of the class or subclass to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court,

(f) give an address to which members of the class or subclass may direct inquiries about the proceeding, and

(g) give any other information that the court considers appropriate.

ULCC Commentary: Section 20 states that, if a court can only determine individual issues after receiving the evidence of individual class members, then the representative plaintiff must give notice to the individual class members in accordance with this section and subsection (3) to (5) of section 19.

Notice to protect interests of affected persons

Recommendation 9(2).
Discussed in chapter 4, heading F (pp. 102-106).
In particular, see p. 105 (notice to protect interests of affected persons).

21.- (1) At any time in a class proceeding, the court may order any party to give notice to the persons that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

(2) Subsections 19 (3) to (5) apply to notice given under this section.

ULCC Commentary: Section 21 is also a notice section. This section permits the court to order any party to give notice to a person, if the court determines that notice is necessary to protect the interests of any class member or party or to ensure the fair conduct of the class proceeding.

Approval of notice by the court

Recommendation 9(3).
Discussed in chapter 4, heading F (pp. 102-106).
In particular, see p. 105 (court approval of notice).

22. A notice under this Division must be approved by the court before it is given.

ULCC Commentary:
This section requires that all notices given under this Division must be approved by the court.

Giving of notice by another party

Recommendation 9(5).
Discussed in chapter 4, heading F (pp. 102-106).
In particular, see p. 105 (giving of notice by another party).

23. The court may order a party to give the notice required to be given by another party under this Act.

ULCC Commentary: Section 23 permits the court to order one party to give the notice required of another party.

Costs of notice

Recommendation 9(4).
Discussed in chapter 4, heading F (pp. 102-106).
In particular, see p. 105 (costs of notice).

24.- (1) The court may make any order it considers appropriate as to the costs of any notice under this Division, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

ULCC Commentary: This section gives the court discretion in awarding the costs of notice and allows the court to apportion costs among parties and among subclasses.

PART IV: Orders, Awards and Related Procedures

Order on Common Issues and Individual Issues

Contents of order on common issues

Recommendation 10(1).
Discussed in chapter 4, heading G (pp. 106-108).

25. An order made in respect of a judgment on common issues of a class or subclass must

(a) set out the common issues,

(b) name or describe the class or subclass members to the extent possible,

(c) state the nature of the claims asserted on behalf of the class or subclass, and

(d) specify the relief granted.

ULCC Commentary: The order respecting common issues includes details respecting the common issues, class members, the nature of their claims and the relief granted. It is necessary to include this detail to ensure that it is clear who is bound by the order and to what extent.

Judgment on common issues is binding

Recommendation 10(2) and (3).
Discussed in chapter 4, heading G (pp. 106-108).
In particular, see p. 107 (court discretion to exempt certain persons from binding effect, redrafting to clarify position of resident and non-resident class members).

26.- (1) A judgment on common issues of a class or subclass binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that

(a) are set out in the certification order,

(b) relate to claims described in the certification order, and

(c) relate to relief sought by the class or subclass as stated in the certification order.

(2) A judgment on common issues of a class or subclass does not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out of the class proceedings.

ULCC Commentary: While the doctrine of *res judicata* prevents parties from re-litigating matters, it is not clear that the doctrine would apply to class members who are not parties. To clarify any uncertainty in the law, subsection (1) provides that the judgment is binding on every class member who has not opted out, to the extent of the common questions and relief specified in the certification order. Subsection (2) ensures that a class member who opts out cannot later benefit from the class action judgment.

Determination of individual issues

Recommendation 10(4).
Discussed in chapter 4, heading G (pp. 106-108)

27.- (1) If the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under section 32, that are applicable only to certain individual members of the class or subclass, the court may

(a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court,

(b) appoint one or more persons including, without limitation, one or more independent experts, to conduct an inquiry into those individual issues under the [rules of court] and report back to the court, or

(c) with the consent of the parties, direct that those individual issues be determined in any other manner.

(2) The court may give any necessary directions relating to the procedures that must be followed in conducting hearings, inquiries and determinations under subsection (1).

(3) In giving directions under subsection (2), the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties and, in doing so, the court may

(a) dispense with any procedural step that it considers unnecessary, and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court must set a reasonable time within which individual members of the class or subclass may make claims under this section in respect of the individual issues.

(5) A member of the class or subclass who fails to make a claim within the time set under subsection (4) may not later make a claim under this section in respect of the issues applicable only to that member except with leave of the court.

(6) The court may grant leave under subsection (5) if it is satisfied that

(a) there are apparent grounds for relief,

(b) the delay was not caused by any fault of the person seeking the relief, and

(c) the defendant would not suffer substantial prejudice if leave were granted.

(7) Unless otherwise ordered by the court making a direction under subsection (1) (c), a determination of issues made in accordance with subsection (1) (c) is deemed to be an order of the court.

ULCC Commentary: A procedure is established for determining individual issues that remain after the judgment on the common issues. The court is to develop a procedure that is inexpensive and expeditious. The court is required to set a time limit for class members to make their individual claims, but has a limited ability to waive non-compliance with that time limit.

Individual assessment of liability

Recommendation 10(4).
Discussed in chapter 4, heading G (pp. 106-108).

28. Without limiting section 27, if, after determining common issues in favour of a class or subclass, the court determines that the defendant's liability to individual class members cannot reasonably be determined without proof by those individual class members, section 27 applies to the determination of the defendant's liability to those class members.

ULCC Commentary: This section provides that section 27 can be used to determine individual liability issues.

Aggregate Awards

Aggregate awards of monetary relief

Recommendations 15 and 17(4).
Discussed in chapter 4, heading L (pp. 129-141).
In particular, see pp. 131-132 (aggregate v. individual awards).

29.- (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

(a) monetary relief is claimed on behalf of some or all class members,

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

(2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,

(a) submissions that contest the merits or amount of an award under that subsection, and

(b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

ULCC Commentary: Although in some cases the injuries to class members will be so varied that individual proceedings will be required to establish the total amount of damages, this section authorizes the treatment of monetary relief as a common question. It is particularly useful when the injuries to the class members are relatively consistent.

Statistical evidence may be used

Recommendation 16.
Discussed in chapter 4, heading L (pp. 129-141).
In particular, see pp. 132-133 (use of statistical evidence –s. 30 not needed).

30.- (1) For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared by or published under the authority of an enactment of the Parliament of Canada or the legislature of any province may be admitted as evidence without proof of its authenticity.

(3) Statistical information must not be admitted as evidence under this section unless the party seeking to introduce the information

(a) has given to the party against whom the statistical evidence is to be used a copy of the information at least 60 days before that information is to be introduced as evidence,

(b) has complied with subsections (4) and (5), and

(c) introduces the evidence by an expert who is available for cross-examination on that evidence.

(4) Notice under this section must specify the source of any statistical information sought to be introduced that

(a) was prepared or published under the authority of an enactment of the Parliament of Canada or the legislature of any province,

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public, or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), notice under this section must

(a) specify the name and qualifications of each person who supervised the preparation of the statistical information sought to be introduced, and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) Unless this section provides otherwise, the law and practice with respect to evidence tendered by an expert in a proceeding applies to a class proceeding.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

ULCC Commentary: Statistical evidence has been used in class action litigation to reduce the administrative and evidentiary problems encountered in the use of traditional means of proof to establish the effect of a product or practice on a large number of people. The Ontario and British Columbia Acts only allow statistical evidence to be used for the purpose of determining issues related to the amount or distribution of a monetary award. In the United States, it can also be used to establish liability. This section provides that statistical evidence can be used by the court in determining the amount or distribution of an aggregate monetary award. The party wishing to introduce statistical evidence is to give the other side 60 days' notice of that intention, details respecting its source and must introduce it through an expert. The Quebec Code does not specifically address this issue; instead it gives the court broad powers to prescribe measures to simplify proof.

Average or proportional share of aggregate awards

Recommendation 18.
Discussed in chapter 4, heading L (pp. 129-141).
In particular, see pp. 133-134 (apportionment of aggregate awards – average apportionment).

31.- (1) If the court makes an order under section 29, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if

(a) it would be impractical or inefficient to

(i) identify the class or subclass members entitled to share in the award, or

(ii) determine the exact shares that should be allocated to individual class or subclass members, and

(b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.

(2) If an order is made under subsection (1), any member of the class or subclass in respect of which the order was made may, within the time specified in the order, apply to the court to be excluded from the proposed distribution and to be given the opportunity to prove that member's claim on an individual basis.

(3) In deciding whether to exclude a class or subclass member from an average distribution, the court must consider

(a) the extent to which the class or subclass member's individual claim varies from the average for the class or subclass,

(b) the number of class or subclass members seeking to be excluded from an average distribution, and

(c) whether excluding the class or subclass members referred to in paragraph (b) would unreasonably deplete the amount to be distributed on an average basis.

(4) An amount recovered by a class or subclass member who proves that member's claim on an individual basis must be deducted from the amount to be distributed on an average basis before the distribution.

ULCC Commentary: Where the court makes an aggregate monetary award, it can order that the award be shared by class members on an average or proportional basis. Where individual class members object to receiving an average or proportional share, the court has discretion to allow them to prove their claims on an individual basis.

Individual share of aggregate award

Recommendation 17.
Discussed in chapter 4, heading L (pp. 129-141).
In particular, see pp. 133-134 (apportionment of aggregate awards – individual apportionment), p. 134 (no substantial prejudice to any person, amended judgment not to increase aggregate award).

32.- (1) When the court orders that all or a part of an aggregate monetary award under section 29 (1) be divided among individual class or subclass members on an individual basis, the court must determine whether individual claims need to be made to give effect to the order.

(2) If the court determines under subsection (1) that individual claims need to be made, the court must specify the procedures for determining the claims.

(3) In specifying the procedures under subsection (2), the court must minimize the burden on class or subclass members and, for that purpose, the court may authorize

(a) the use of standard proof of claim forms,

(b) the submission of affidavit or other documentary evidence, and

(c) the auditing of claims on a sampling or other basis.

(4) When specifying the procedures under subsection (2), the court must set a reasonable time within which individual class or subclass members may make claims under this section.

(5) A class or subclass member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

(6) Subsection 27 (6) applies to a decision whether to grant leave under subsection (5) of this section.

(7) The court may amend a judgment given under subsection 29 (1) to give effect to a claim made with leave under subsection (5) of this section if the court considers it appropriate to do so.

ULCC Commentary: Where an aggregate award is to be divided among class members on an individual basis, the court will decide how that will be done. For example, the court may authorize the use of standard claim forms. The time limit set by the court within which those individual claims are to be made may be waived, on the same grounds as for waiver of the time limit in section 27.

Other Jurisdictions:

[1] Ont. s. 24(9) specifies:

> The court may give leave under subsection (8) if it is satisfied that,
>
> (a) there are apparent grounds for relief;
>
> (b) the delay was not caused by any fault of the person seeking the relief; and
>
> (c) the defendant would not suffer substantial prejudice if leave were given.

Distribution

Recommendation 19.
Discussed in chapter 4, heading L (pp. 129-141).
In particular, see pp. 134-135 (distribution of aggregate awards – "enforcement" of judgment, not "execution").

33.- (1) The court may direct any means of distribution of amounts awarded under this Division that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that

(a) the defendant distribute directly to the class or subclass members the amount of monetary relief to which each class or subclass member is entitled by any means authorized by the court, including abatement and credit,

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class or subclass members until further order of the court, or

(c) any person other than the defendant distribute directly to each of the class or subclass members, by any means authorized by the court, the amount of monetary relief to which that class or subclass member is entitled.

(3) In deciding whether to make an order under clause (2) (a), the court

(a) must consider whether distribution by the defendant is the most practical way of distributing the award, and

(b) may take into account whether the amount of monetary relief to which each class or subclass member is entitled can be determined from the records of the defendant.

(4) The court must supervise the execution of judgments and the distribution of awards under this Division and may stay the whole or any part of an execution or distribution for a reasonable period on the terms it considers appropriate.

(5) The court may order that an award made under this Division be paid

(a) in a lump sum, promptly or within a time set by the court, or

(b) in instalments, on the terms the court considers appropriate.

(6) The court may

(a) order that the costs of distributing an award under this Division, including the costs of any notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment, and

(b) make any further or other order it considers appropriate.

ULCC Commentary: The court is also given discretion to determine the most efficient way to distribute the funds, whether by immediate or deferred lump sum or in instalments. It may find that distribution by the defendant is the most practical way, particularly if the class members are account holders with the defendant. The costs of distribution may be paid out of the award. British Columbia and Ontario include a similar provision. The Quebec Code does not provide for distribution by the defendant.

Undistributed award

Recommendation 20.
Discussed in chapter 4, heading L (pp. 129-141).
In particular, see p. 136 (cy-près distribution of undistributed portion of aggregate award), pp. 136-138 (court discretion over disposition of undistributed residue), p. 138 (statutory presumption that residue will be returned to defendant; if inappropriate, judicial discretion without constraints in s. 34(5); undistributed residue encompasses surplus from individual or average apportionment).

34.- (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

(2) In deciding whether to make an order under subsection (1), the court must consider

(a) whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass, and

(b) any other matter the court considers relevant.

(3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under subsection (1) even if the order would benefit

(a) persons who are not class or subclass members, or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(5) If any part of an award that, under subsection 32 (1), is to be divided among individual class or subclass members remains unclaimed or otherwise undistributed after a time set by the court, the court may order that part of the award

(a) be applied against the cost of the class proceeding,

(b) be forfeited to the Government, or

(c) be returned to the party against whom the award was made.

ULCC Commentary: If part of an aggregate award remains after individual claims have been paid, the court may order that the undistributed funds be used in a manner that will benefit class members generally. This method can be used even if non-class members and class members who have received individual awards would benefit from the distribution. This is often referred to as a cy-prés distribution.

Where money designated to pay individual claims is not all distributed, the court may determine whether it should be returned to the defendant, forfeited to the government or used to pay the costs of the class action. This approach is consistent with the British Columbia Act. The Ontario Act provides that undistributed funds that were designated to pay individual claims be returned to the defendant. In Quebec the court has discretion to determine the appropriate distribution of these funds.

Other Jurisdictions:

[1] Ont. s. 26(10) requires an unclaimed or undistributed award to be "returned to the party against whom the award was made, without further order of the court". It does not offer the options set out in ULCC s. 34(5)(a) and (b).

Termination of Proceedings and Appeals

Settlement, discontinuance, abandonment and dismissal

Recommendation 14.
Discussed in chapter 4, headings F (at p. 104), and K (pp. 125-128).

35.- (1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(3) A settlement under this section is not binding unless approved by the court.

(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding,

(b) a statement of the result of the proceeding, and

(c) a description of any plan for distributing any settlement funds.

ULCC Commentary: A class action cannot be settled, discontinued or abandoned without the approval of the court. A settlement that is approved by the court is binding on every class member. When dismissing a class action or approving a settlement, discontinuance or abandonment, the court must decide whether notice of the order should be given to the class members.

Other Jurisdictions:

[1] ManLRC adds s. 35(6):

> Before approving a settlement under subsections (1) or (2), the court must be satisfied that the agreement is fair, reasonable, and in the best interests of those affected by it. In making that determination, the court must consider, inter alia:
>
> (a) the settlement terms and conditions,
> (b) the nature and likely duration and cost of the proceeding,
> (c) the amount offered in relation to the likelihood of success in the proceeding,
> (d) the expressed opinions of class members other than the representative party,
> (e) recommendations of neutral parties, if any, and
> (f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members.

Appeals

Recommendation 21.
Discussed in chapter 4, heading M (pp. 141-143).
In particular, see p. 142 (all appeals as of right–no leave requirement and no monetary limit).

36.- (1) Any party may appeal without leave to the [appellate court of the enacting jurisdiction] from

(a) a judgment on common issues, or

(b) an order under Division 2 of this Part, other than an order that determines individual claims made by class or subclass members.

(2) With leave of a justice of the [appellate court of the enacting jurisdiction], a class or subclass member, a representative plaintiff or a defendant may appeal to that court any order

(a) determining an individual claim made by a class or subclass member, or

(b) dismissing an individual claim for monetary relief made by a class or subclass member.

(3) With leave of a justice of the [appellate court of the enacting jurisdiction], any party may appeal to the [appellate court of the enacting jurisdiction] from

(a) an order certifying or refusing to certify a proceeding as a class proceeding,

(b) an order decertifying a proceeding.

(4) If a representative plaintiff does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under [the relevant section of the enactment establishing the appellate court of the enacting jurisdiction] or if a representative plaintiff abandons an appeal under subsection (1) or (3), any member of the class or subclass for which the representative plaintiff had been appointed may apply to a justice of the [appellate

court of the enacting jurisdiction] for leave to act as the representative plaintiff for the purposes of subsection (1) or (3).

(5) An application by a class or subclass member for leave to act as the representative plaintiff under subsection (4) must be made within 30 days after the expiry of the appeal period available to the representative plaintiff or by such other date as the justice may order.

ULCC Commentary: Subsections (1) and (3) allows for an appeal from an order refusing to certify a class action, an order decertifying a class action, a judgment on the common issues and an order respecting an aggregate award.

An appeal from a certification order is available only with leave. This is the Ontario approach. British Columbia provides an appeal as of right, and Quebec does not allow for certification orders to be appealed.

The intention of subsections (2), (4) and (5) is that the local practice of each jurisdiction governing appeals generally is to be followed but is to be augmented where necessary to give a class member, subclass member, representative plaintiff or defendant standing in appropriate circumstances. It follows that subsections (2), (4) and (5) may differ from jurisdiction to jurisdiction.

Other Jurisdictions:

[1] ULCC s. 36(2) is the same as B.C. s. 36(4) and ManLRC s. 36(2). Ont. s. 30(6), (7), (8), allow appeals to the Divisional Court of individual awards of more than $3,000 whereas Ont. s. 30(9), (10) and (11) require leave of the Ontario Court (General Division) to appeal individual awards of $3,000 or less or orders dismissing the claim of an individual class member. Ont. s. 30(6) permits a class member to appeal from an order under Ont. s. 24 or 25 "determining an individual claim made by the member and awarding more than $3,000 to the member". Ont. s. 30(7) permits a representative plaintiff to appeal from an order under Ont. s. 24 in the same circumstances, and Ont. s. 30(8) permits a defendant to appeal from an order under Ont. s. 25. With leave, Ont. s. 30(9) permits a class member to appeal from an order under Ont. s. 24 or 25, Ont. s. 30(10) permits a representative plaintiff to appeal from an order under Ont. s. 24 and Ont. s. 30(11) permits a defendant to appeal from an order under Ont. s. 25.

[2] ULCC s. 36(3) is the same as ManLRC s. 36(3). B.C. s. 36(1)(a) and (b) are the same, except that there is no leave requirement. Ont. s. 30(1) permits a party to appeal without leave "from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding". Ont. s. 30(2) permits a party to appeal with leave of the Ontario Court (General Division) "from an order certifying a proceeding as a class proceeding". In both cases, the appeal is to the Divisional Court.

PART V: Costs, Fees and Disbursements

Costs

Recommendation 22.
Discussed in chapter 4, heading N (pp. 143-154).
In particular, see p. 154 (adopt ULCC "no costs" alternative).

37.- (1) Class members, other than the representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

(2) In determining by whom and to what extent costs should be paid, a court may consider whether the class proceeding was a test case, raised a novel point of law or addressed an issue of significant public interest.

(3) A court that orders costs may order that those costs be assessed in any manner that the court considers appropriate.

[Alternatively]
[37.- (1) Subject to this section, neither the [superior or the appellate court of the jurisdiction] may award costs to any party to an application for certification under subsection 2 (2) or section 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

(2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding

(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,

(b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or

(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.

(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

(4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

ULCC Commentary: Normal costs rules pose barriers to bringing a class action. Although the whole class may benefit from the action, the representative plaintiff shoulders the burden of paying lawyers' fees and disbursements and will receive only a portion of the total costs back if he or she is successful. The representative plaintiff is also liable for any costs ordered by the court if the action is unsuccessful. This section is based on the section in the Ontario Act respecting costs. It adopts a similar approach to the Quebec Act that provides that, for the most part, the normal costs rules apply. It should be noted that, in class actions legislation generally, this is the approach adopted where a fund is provided to assist the representative plaintiff in paying for the expenses of a class action including any costs that may be awarded against him or her.

The alternative approach, adopted by British Columbia and recommended by the Ontario Law Reform Commission, is a "no costs" rule, in which the presumption is that costs will not be awarded to any party unless there is frivolous, vexatious or abusive conduct by that party.

The approach adopted in each jurisdiction will depend to some extent on whether it establishes a fund to provide financial assistance to representative plaintiffs.

Other Jurisdictions:

[1] ULCC s. 37 is close to Ont. s. 31.

[2] ULCC s. 37(3) differs from Ont. s. 31(3), which says:

> Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

[3] B.C. and ManLRC adopt the ULCC alternative provision.

Agreements respecting fees and disbursements

Recommendation 23.
Discussed in chapter 4, heading O (pp. 154-165).
In particular, see pp. 159-164 (court approval of fee agreement *both* at or before certification *and* upon determination of the common issue or settlement), p. 164 (outside funding).

38.- (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must

(a) state the terms under which fees and disbursements are to be paid,

(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and

(c) state the method by which payment is to be made, whether by lump sum or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

(3) An application under subsection (2) may,

(a) unless the court otherwise orders, be brought without notice to the defendants, or

(b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.

(4) Interest payable on fees under an agreement approved under subsection (2) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the interest rate, as that term is defined in [the court order interest Act of the enacting jurisdiction], or

(b) at any other rate the court considers appropriate.

(5) Interest payable on disbursements under an agreement approved under subsection (2) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the interest rate, as that term is defined in [the court order interest Act of the enacting jurisdiction], or

(b) at any other rate the court considers appropriate, on the balance of disbursements incurred as totaled at the end of each 6 month period following the date of the agreement.

(6) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(7) If an agreement is not approved by the court, the court may

(a) determine the amount owing to the solicitor in respect of fees and disbursements,

(b) direct an inquiry, assessment or accounting under the [rules of court] to determine the amount owing, or

(c) direct that the amount owing be determined in any other manner.

ULCC Commentary: Solicitor-client agreements respecting fees are subject to the approval of the court. They must be in writing and specify the terms of payment of fees and disbursements. An application for approval of the agreement will not normally be served on the defendant. The amounts owing under the agreement are a first charge on any funds recovered in the class action.

Other Jurisdictions:

[1] ManLRC adds s. 38(4) as follows:

> An application under subsection (2) must be brought prior to certification of the proceeding as a class proceeding.

[2] ManLRC adds s. 38(9):

> An application under subsection 58(4) of the Law Society Act must be made to
> (a) the judge who presided at the trial of the common issues, or
> (b) the judge who approved the settlement agreement
> as the case may be.

[3] Ont. adds s. 33, as follows:

> 33.(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members.

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur")

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

PART VI: General

Limitation periods

Recommendation 24
Discussed in chapter 4, heading P (pp. 165-167).
In particular, see pp. 166-167 (suspension from commencement of proceeding regardless of certification success).

39.- (1) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding

(a) is suspended in favour of a person if another proceeding was commenced and it is reasonable for the person to assume that he or she was a class member for the purposes of that other proceeding, and

(b) resumes running against the person when clauses (2) (a) to (g) applies to the person as though he or she was the member referred to in subsection (2).

(2) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when

(a) the member opts out of the class proceeding,

(b) a ruling by the court has the effect of excluding the class member from the class proceeding or from being considered to have ever been a class member,

(c) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding,

(d) a decertification order is made under section 10,

(e) the class proceeding is dismissed without an adjudication on the merits,

(f) the class proceeding is discontinued or abandoned with the approval of the court, or

(g) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(3) If there is a right of appeal in respect of an event described in subsection (2) (a) to (g), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

ULCC Commentary: Generally, statutory limitation periods stop running when an action is commenced. Special rules are needed with respect to the application of limitation periods in class actions. On the commencement of the action the limitation period is suspended for all class members. If the limitation period continued to run against class members until after certification, they might be forced to start individual actions to preserve their causes of action. Time will begin running again when a class member opts out or is excluded from the class or the class action is decertified, dismissed, discontinued, abandoned or settled. Subsection 39 (2) includes a provision that was not addressed in August of 1995. It addresses the issue of what happens if part, but not all, of a class is certified. The wording in clause 39 (2) (b) anticipates this situation and states that a limitation period will recommence if a court rules that a person never was a member of the class proceeding.

Rules of Court

Recommendation 13.
Discussed in chapter 4, heading J (p. 125).

40. The [rules of court] apply to class proceedings to the extent that those rules are not in conflict with this Act.

ULCC Commentary: The Rules of Court apply where they are not in conflict with this Act. Jurisdictions will need to consider whether or not to delete their rule of court that allows for representative proceedings.

Application of Act

Recommendation 27.
Discussed in chapter 4, heading S (p. 193).
In particular, see p. 193 (add "or defended" to s. 41(a)).

41. This Act does not apply to

(a) a proceeding that may be brought in a representative capacity under another Act,

(b) a proceeding required by law to be brought in a representative capacity, and

(c) a representative proceeding commenced before this Act comes into force.

ULCC Commentary: This Act does not apply to proceedings brought in a representative capacity.

Defendant class proceedings

[This topic is not dealt with in the ULCC Act.]

Recommendation 26.
Discussed in chapter 4, heading R (pp. 170-192).
In particular, see p. 183 (recommendation to take Ontario approach), pp. 183-184 (modification of plaintiff class action provisions in general), pp. 184-185 (plan for advancing proceedings not required for certification), pp. 185-186 (timing of application), pp. 186-187 (common issues raised by claims *against* class members), pp. 187-189 (no opting out by resident class members, right to apply to be named as a defendant), p. 190 (no opting out by non-resident class members--same treatment as resident class members), p. 190 (court approval not required for plaintiff discontinuance), pp. 190-192 (plaintiff limitation period suspended only until certification decision, resumption of limitation period upon discontinuance, substitute "claims" for "cause of action" in s. 39)

APPENDIX B

INDIVIDUALS CONSULTED ON CLASS ACTIONS PROJECT

Mr. Derek Allchurch	Vice President, Legislative Review, Alberta Civil Trial Lawyers Association
Ms. Wendy Armstrong	Consumers Association of Canada (Alberta)
Ms. Susan Ayala	Justice Canada, Prairies & Northwest Territories Reg.
The Honourable R. Paul Belzil	Court of Queen's Bench of Alberta
Mr. Paul C. Bourque	Alberta Justice
Mr. Tom Buglas	Docken & Company
Mr. Everett L. Bunnell, Q.C.	Parlee McLaws
Mr. Robert W. Calvert	Dunphy Calvert
The Honourable Justice Jean E.L. Côté	Court of Appeal of Alberta
Ms. Catherine A. Coughlan	Justice Canada
Mr. Roderick B. Davison, Q.C.	Parlee McLaws
Mr. Clinton Docken, Q.C.	Docken & Co.
Ms. Heather A. Donison	North & Company
Mr. Stewart N. Douglas	Vice-President, Legal Services, TELUS
Mr. Richard Drewry	Emery Jamieson
Mr. Sean Dunnigan	Field Atkinson
Mr. Jonathan P. Faulds	Field Atkinson
Mr. Steve Fitterman	Shapray Cramer
Mr. Anthony L. Friend, Q.C.	Bennett Jones
Mr. Allan Garber	Parlee McLaws
Mr. Rick J. Gilborn	Major Caron

Mr. Steve Glover	Executive Director, Institute of Chartered Accountants
Mr. Ray Hansen	General Counsel, Syncrude Canada Ltd.
Mr. Rodney L. Hayley	Lawson Lundell Lawon & McIntosh
Ms. Elizabeth A. Johnson	Ackroyd, Piasta, Roth and Day
Mr. Bradley J. Knight	Baithwaite, Boyle
Mr. Walter Kubitz	Everard & Co.
Ms. Diana Lowe	Executive Director, Canadian Forum on Civil Justice
Mr. Havelock B. Madill, Q.C.	McLennan Ross
Mr. Eric F. Macklin, Q.C.	Duncan & Craig
Mr. Jim McFadyen	Parlee McLaws
Mr. Douglas A. McGillivray, Q.C.	Burnet, Duckworth & Palmer
Mr. R. Graham McLennan	McLennan Ross
The Honourable Terrence F. McMahon	Court of Queen's Bench of Alberta
Mr. Ken B. Mills	Blake, Cassels & Graydon
Ms. Donna L. Molzan	Department of Justice, Legal Research and Analysis
The Honourable W. Kenneth Moore	Chief Justice, Court of Queen's Bench of Alberta
Mr. James R. Nickerson	Nickerson Roberts
Mr. Lorne Olsvik, President	Alberta Urban Municipalities Association
Mr. S. Noel Rea	Imperial Oil Ltd.
Mr. Andrew J. Roman	Miller Thomson
The Honourable John D. Rooke	Court of Queen's Bench of Alberta
Professor June M. Ross	Associate Dean (Academics), Faculty of Law, University of Alberta
Ms. Joanne Schiweck	Manager of Claims, Alberta Motor Association

Mr. Frans F. Slatter	McCuaig Desrochers
Mr. Eric T. Spink	Alberta Securities Commission
Mr. Tom Stepper	Merchant Law Group
Ms. Jane Ann Summers	Merchant Law Group
Ms. Francine Swanson	Amoco Canada Petroleum Company Ltd.
Ms. Stephanie J. Thomas	President, Alberta Civil Trial Lawyers Association
Ms. Juliana E. Topolniski, Q.C.	Bishop & McKenzie
The Honourable Allan H.J. Wachowich	Chief Justice, Court of Queen's Bench of Alberta
Mr. Robert B. White, Q.C.	Lucas Bowker
Mr. Charles F. Willms	Russell & DuMoulin